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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, ~~1904.~~ 1905.

No. ~~254.~~ 24.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, APPELLANT,

vs.

THE INTERSTATE COMMERCE COMMISSION.

FILED MAY 13, 1904.

No. ~~260.~~ 27.

THE INTERSTATE COMMERCE COMMISSION, APPELLANT,

vs.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY AND THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY.

FILED MAY 16, 1904.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF VIRGINIA.

(19347 AND 19358)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 254.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, APPELLANT,

vs.

THE INTERSTATE COMMERCE COMMISSION.

FILED MAY 13, 1904.

No. 260.

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vs.

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FILED MAY 16, 1904.

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a TRANSCRIPT OF RECORD.

UNITED STATES OF AMERICA,
Western District of Virginia, ss:

Pleas in the circuit court of the United States of the western district of Virginia, at Lynchburg, before the honorable Henry C. McDowell, judge of the district court of said district, on Monday, the 14th day of March, anno Domini 1904, and in the 178th year of the Independence of the United States.

INTERSTATE COMMERCE COMMISSION
versus
THE CHESAPEAKE AND OHIO RAILWAY COMPANY and the New York, New Haven and Hartford Railroad Company. } In equity.

Be it remembered that heretofore, to wit, on the 13th day of July, 1903, in the clerk's office of the said circuit court of the United States, came the said Interstate Commerce Commission and Thomas Lee Moore, esq., United States district attorney for the western
b district of Virginia, pursuant to the direction of the honorable Philander C. Knox, Attorney-General of the United States, and filed his petition against the Chesapeake and Ohio Railway Company and the New York, New Haven and Hartford Railroad Company, which petition is in the words and figures following, to wit:

IN THE

Circuit Court of the United States

IN AND FOR THE WESTERN DISTRICT OF VIRGINIA.

INTERSTATE COMMERCE COMMISSION

v.

THE CHESAPEAKE & OHIO RAILWAY COMPANY AND THE NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY.

IN EQUITY.

To the Judges of the Circuit Court of the United States for the Western District of Virginia:

Now comes the Interstate Commerce Commission, represented by Thomas Lee Moore, Esq., United States District Attorney for the Western District of Virginia, pursuant to the direction of the Honorable Philander C. Knox, Attorney-General of the United States, and presents this petition against the Chesapeake & Ohio Railway Company, a corporation and resident of the State of Virginia, and the New York, New Haven & Hartford Railroad Company, a corporation and resident of the State of Connecticut.

And thereupon, your petitioner complains and says:—

That the said Chesapeake & Ohio Railway Company is engaged in carrying freight traffic between the Kanawha District in the State of West Virginia and Newport News in the State of Virginia at less than its published rates on file, and is committing a discrimination forbidden by law, and that said act or acts hereinafter more specifically set forth and herein com-

plained of have been committed and are being committed in part in the Western Judicial District of the State of Virginia, and that such freight traffic is being carried for the New York, New Haven & Hartford Railroad Company as hereinafter more specifically set forth.

Your petitioner further shows that it has reasonable ground for belief that the said Chesapeake & Ohio Railway Company is engaged in the carriage of freight traffic at less than its published rates on file, and is committing a discrimination forbidden by law, as above set forth.

Petitioner states and charges that during the Spring of 1903, the Chesapeake & Ohio Railway Company made a contract to carry a large amount of coal, to-wit: sixty thousand (60,000) tons, from the Kanawha District of West Virginia to Tidewater at Newport News, in the State of Virginia, for shipment to New Haven for the New York, New Haven & Hartford Railroad Company, for which said traffic the Chesapeake & Ohio Railway Company would realize for carrying the same from twenty ($.20) to sixty ($.60) cents per ton. At least, petitioner is informed and believes that the rate the Chesapeake & Ohio Railway Company will receive on this traffic, or is receiving on the same, is far below $1.45 per ton, its published rate for carrying coal from the Kanawha District of West Virginia to Tidewater, at Newport News, Virginia, for shipment beyond the capes of the Chesapeake.

Petitioner further states that it is informed and believes that the Chesapeake & Ohio Railway Company is now engaged in carrying the 60,000 tons of coal aforesaid, and that out of that amount it has already carried and delivered, at least 25,000 tons, at a rate far below its published rate aforesaid.

Petitioner further says that it is informed and believes that the Chesapeake & Ohio Railway Company undertakes to justify its action in the premises on the ground that in 1896 a contract was made by the Chesapeake & Ohio Railway Company with the New York, New Haven & Hartford Railroad Company, by which the former sold and agreed to deliver to the latter two millions of tons of best quality of coal, on or before the 1st day

of July, 1902, delivery to begin July 1st, 1897 and not to exceed 400,000 tons per annum. The price to be paid by the New York, New Haven & Hartford Railroad Company to the Chesapeake & Ohio Railway Company for this coal was Two dollars and seventy-five cents ($2.75) per ton, on the New Haven basis.

Petitioner says that it is informed and believes that during the life of this contract, up to and including the month of June, 1902, (after which time deliveries ceased) the Chesapeake & Ohio Railway Company had failed to deliver about 60,000 tons of coal, required by the contract aforesaid.

Petitioner further says that it is informed and believes that this contract was illegal and void, and that the Chesapeake & Ohio Railway Company had no power to make such a contract, and that the contract for this coal was at such a price that the freight rate thereon to be received by the Chesapeake & Ohio Railway Company during a considerable period covered by the contract, was far below its published rates.

Petitioner further says that it is informed and believes that some months after the contract aforesaid had expired, the New York, New Haven & Hartford Railroad Company rendered a bill to the Chesapeake & Ohio Railway Company for something over One Hundred thousand ($100,000.) dollars, damages for failure to deliver the coal called for by the contract aforesaid, and during the winter of 1902-'03 the President of the Chesapeake & Ohio Railway Company arranged, through a coal broker by name ————Wittenburg, and a coal operator in the Kanawha District by name————Thomas, by which it was agreed that Thomas should ship 60,000 tons of coal from the Kanawha District to the New York, New Haven & Hartford Railroad Company, at $2.75 per ton, said coal to be delivered prior to July 31st, 1903.

Petitioner further states that it is informed and believes that the cost of delivery of this coal per ton at New Haven not including the freight rate to the Chesapeake & Ohio Railway Company from the Kanawha District of West Virginia to Newport News, in Virginia, is as follows:—

COPY.

Contract made between the Chesapeake & Ohio Railway Company and the New York, New Haven & Hartford Railroad Company.

Said Chesapeake & Ohio Railway Company, for the consideration hereinafter mentioned, hereby agrees to furnish to said railroad company not to exceed two million gross tons of bituminous coal from its line in such quantities monthly as wanted from July 1st, 1897, to July 1st, 1902, without charge for demurrage. Deliveries to be made not exceeding four hundred thousand tons per annum.

And said Chesapeake & Ohio Railway Company further agrees that all said bituminous coal shall be of the best quality first class in every respect, and satisfactory to said railroad company and said railway company has the right to terminate this contract at any time if said bituminous coal be of poor quality, or if its deliveries be unnecessarily delayed.

And said Chesapeake & Ohio Railway Company further agrees to deliver all said bituminous coal to said railroad company in its bins at such ports upon its line as required by the monthly requisitions of its purchasing agent.

In consideration of the faithful performance by the said Chesapeake & Ohio Railway Company of all its agreements herein contained, said railroad company agrees to pay for said bituminous coal at the rate of two and seventy-five one hundreths dollars per gross ton New Haven basis, settlement to be made *monthly*.

Said railway company has the right to cancel any and all portions of said quantity of bituminous coal remaining undelivered on July 1st, 1902.

Witness the names of the parties hereto this the 3rd day of December, 1896.

(Sgd) CHESAPEAKE & OHIO RY. CO.
By M. E. Ingalls, President.
(Sgd) THE NEW YORK, NEW HAVEN & HARTFORD
RAILROAD COMPANY,
By C. S. Mellen, 2nd Vice-Prest.

BEFORE THE INTERSTATE COMMERCE COMMISSION.

IN THE MATTER OF THE ALLEGED UNLAWFUL RATES CHARGED BY THE CHESAPEAKE & OHIO RAILWAY COMPANY FOR THE TRANSPORTATION OF COAL SHIPPED FROM WEST VIRGINIA MINES TO NEW HAVEN, CONNECTICUT, AND OTHER POINTS IN NEW ENGLAND.

Hearing at Washington, D. C., July 3, 1903.

Present:

Commissioner Clements.

Appearances:

W. A. Glasgow, for William C. Bullitt;

H. T. Wickham, for The Chesapeake & Ohio Railway Co.

Frank M. Young,
Stenographer.

10:40 A. M., Thursday, July 3rd, 1903.

Commissioner Clements: Gentlemen, this is a matter of inquiry started by the following order:

"July 1, 1903, before the Interstate Commerce Commission, etc.

"On reading and filing the affidavit of W. C. Bullitt, alleging that coal consigned to the New York, New Haven & Hartford Railroad Company from West Virginia mines to New Haven, Connecticut, has been and is being transported by the Chesapeake & Ohio Railway Company for less than its published tariff rates:

"*It is ordered,* That a proceeding of inquiry and investigation into the manner and method in which the said Chesapeake & Ohio Railway Company conducts and manages its business,

particularly in relation to the transportation of coal for the New York, New Haven & Hartford Railroad Company from mines in the State of West Virginia and the rates charged or received for such transportation, be and is hereby instituted; and that said Chesapeake & Ohio Railway Company is hereby made the respondent in said proceeding."

That order is based upon an affidavit which I do not know whether you have seen yet or not. Will you read it, Mr. Glasgow?

Mr. Glasgow (reading):

"City of Washington, District of Columbia. } ss.

"This day personally appeared before the undersigned, Martin S. Decker, Notary Public for the City of Washington and District aforesaid, William C. Bullitt, and being by me duly sworn deposed and saith:

"First. That he is engaged in the business of selling coal and that his place of business is the Arcade Building, Philadelphia, Pennsylvania.

"Second. That he has been offered coal in the Kanawha District on the line of the Chesapeake & Ohio Railway Company in the State of West Virginia at a price which is very attractive to him, and which he wishes to purchase; and desiring to remove the same to Newport News for shipment beyond the capes of the Chesapeake, he applied to the Chesapeake & Ohio Railway Company for a freight rate on coal from the said Kanawha District of West Virginia to Newport News, which said coal was to be shipped beyond the capes of the Chesapeake.

"To his application for rates, as aforesaid, the Chesapeake & Ohio Railway Company replied that the rate on coal from the Kanawha District to tidewater, for shipment beyond the capes, is one dollar and forty-five cents ($1.45) per ton, which freight rate has prevented complainant from purchasing the coal offered to him as aforesaid in the Kanawha District of West Virginia, as under this rate he could not afford to move the same at present.

"Affiant further saith that he is informed and believes that during the spring of 1903 the Chesapeake & Ohio Railway Company made a contract to carry a large amount of coal, to wit, sixty thousand (60,000) tons, from the Kanawha District of West Virginia to tidewater, for shipment to New Haven, for the New York, New Haven & Hartford Railroad Company, from which said traffic the Chesapeake & Ohio Railway Company will realize for carrying the same from twenty ($.20) to sixty ($.60) cents per ton; at least affiant is informed and believes that the rate the Chesapeake & Ohio Railway Company will receive on this traffic is far below the published rate of $1.45 above set forth.

"Affiant further states that he is informed and believes that the Chesapeake & Ohio Railway Company is now engaged in carrying the sixty thousand (60,000) tons of coal aforesaid, and that out of that amount it has already carried and delivered at least twenty-five thousand (25,000) tons, at a rate far below its published rate aforesaid.

"Affiant further says that he is informed and believes that the Chesapeake & Ohio Railway Company undertakes to justify this course on the ground that in 1896 a contract was made by the Chesapeake & Ohio Railway Company with the New York, New Haven & Hartford Railroad Company by which the former sold and agreed to deliver to the latter two millions (2,000,000) of tons of best quality of coal on or before the 1st day of July, 1902, delivery to begin July 1, 1897, and not to exceed four hundred thousand (400,000) tons per annum. The price to be paid by the New York, New Haven & Hartford Railroad Company to the Chesapeake & Ohio Railway Company for this coal was two dollars and seventy-five cents ($2.75) per ton on the New Haven basis.

"Affiant says that he is informed and believes that during the life of this contract up to and including the month of June, 1902 (after which time deliveries ceased), the Chesapeake & Ohio Railway Company had failed to deliver about sixty thousand (60,000) tons of coal required by the contract aforesaid.

"Affiant further says that he is informed and believes that this contract was illegal and void and that the Chesapeake & Ohio Railway Company had no power to make such a contract; and affiant verily believes that the contract for this coal was at such a price that the freight rate thereon to be received by the Chesapeake & Ohio Railway Company was far below its published rates.

"Affiant further says that he is informed and believes that some months after the contract aforesaid had expired the New York, New Haven & Hartford Railroad Company rendered a bill to the Chesapeake & Ohio Railway Company for something over one hundred thousand ($100,000) dollars, damages for failure to deliver the coal called for by the contract aforesaid; and during the winter of 1902-1903 the President of the Chesapeake & Ohio Railway Company arranged a new contract between the New York, New Haven & Hartford Railroad Company, through a coal broker, by name Wittenburg, and a coal operator in the Kanawha District, by the name of Thomas, by which it was agreed that Thomas should ship sixty thousand (60,000) tons of coal from the Kanawha District to the New York, New Haven & Hartford Railroad Company, at $2.75 per ton, said coal to be delivered prior to July 31, 1903.

"Affiant further states that he is informed and believes that the cost of delivery of this coal per ton to New Haven, not including the freight rate to the Chesapeake & Ohio Railway Company from the Kanawha District to Newport News, is as follows:

By paid to Thomas, per ton	$1.28
Commission to broker	.05
Ocean rates	about 1.00
Discharging	.19
Total	$2.52

"So that the Chesapeake & Ohio Railway Company realizes from this traffic about twenty-three ($.23) cents per ton for carrying coal from the Kanawha District to Newport News for

shipment beyond the capes of the Chesapeake, and the published tariff of the Chesapeake & Ohio Railway Company for like coal from the same District to the same destination is one dollar and forty-five ($1.45) cents per ton.

"Affiant is informed and believes that the Chesapeake & Ohio Railway Company claims that by this arrangement it is paying off a claim against it asserted by the New York, New Haven & Hartford Railroad Company; but affiant is informed and believes that the said claim against the Chesapeake & Ohio Railway Company is not a valid, legal demand, and that the delivery of this coal to the New York, New Haven & Hartford Railroad Company at the rate to be received by the Chesapeake & Ohio Railway Company is a discrimination against all the other coal produced in the Kanawha District, and prevents affiant from moving the coal in the Kanawha District which has been offered to him as aforesaid.

WILLIAM C. BULLITT.

"Subscribed and sworn to before me this 30th day of June, 1903.

L. S.

MARTIN S. DECKER.
Notary Public."

Commissioner Clements: This, as you see by the nature of the affidavit, is a proceeding under the Twelfth Section of the Act to regulate commerce and its general provisions, under which the Commission is charged with the duties of enforcing this law; and it had this matter brought to its attention by this affidavit. We thought the most appropriate proceeding would be to get some one familiar with the facts representing the railroad to tell us about it, and for that reason we proceeded in rather an informal way by telegram to ask Mr. Stevens, or someone that knew about it, to come here, rather than issue a subpoena. We are glad to have you here. We thought that was the most direct way to get at the facts of the matter and see whether it appeared to be a violation of the law or not. Mr. Stevens, you will please be sworn.

Mr. G. W. Stevens, President of the Chesapeake & Ohio Railway Company, after being duly sworn according to law, testified as follows:

Commissioner Clements: Now, you have heard that affidavit read, Mr. Stevens. Have you a general familiarity with this question?

Mr. Stevens: Yes, sir.

Commissioner Clements: Suppose you just take it and tell us about it from beginning to end without any interrogatories, at least for the present, and then Mr. Glasgow can ask any questions he sees proper, unless you (Mr. Glasgow) prefer to conduct the examination now.

Mr. Glasgow: No, sir.

Commissioner Clements: Mr. Glasgow, you might read the affidavit again, and Mr. Stevens can answer each paragraph separately.

Mr. Glasgow (reading from affidavit): "Second. That he has been offered coal in the Kanawha District on the line of the Chesapeake & Ohio Railway Company in the State of West Virginia at a price which is very attractive to him, and which he wishes to purchase; and desiring to remove the same to Newport News for shipment beyond the capes of the Chesapeake, he applied to the Chesapeake & Ohio Railway Company for a freight rate on coal from the said Kanawha District of West Virginia to Newport News, which said coal was to be shipped beyond the capes of the Chesapeake.

"To his application for rates, as aforesaid, the Chesapeake & Ohio Railway Company replied that the rate on coal from the Kanawha District to tidewater, for shipment beyond the capes, is one dollar and forty-five cents ($1.45) per ton, which freight rate has prevented complainant from purchasing the coal offered to him as aforesaid in the Kanawha District of West Virginia, as under this rate he could not afford to move the same at present."

Mr. Stevens: Such application was made to our Freight Traffic Manager, and he replied in effect the same as stated here,

that our rate was the one that was filed with the Interstate Commerce Commission, and the only one we had on the business.

Commissioner Clements: That is $1.45, is it?

Mr. Stevens: Yes, sir.

Mr. Glasgow (continuing reading from affidavit): "Affiant further saith that he is informed and believes that during the spring of 1903 the Chesapeake & Ohio Railway Company made a contract to carry a large amount of coal, to wit, sixty thousand (60,000) tons, from the Kanawha District of West Virginia to tidewater, for shipment to New Haven, for the New York, New Haven & Hartford Railroad Company, from which said traffic the Chesapeake & Ohio Railway Company will realize for carrying the same from twenty ($.20) to sixty ($.60) cents per ton; at least affiant is informed and believes that the rate the Chesapeake & Ohio Railway Company will receive on this traffic is far below the published rate of $1.45 above set forth."

Mr. Stevens: Such a contract was made to deliver 60,000 tons of coal, which was due on this five-year contract, and which coal would have been delivered last June had not the coal miners' strike interfered. At the time the coal miners' strike was inaugurated, we were within 60,000 tons of filling the five-year contract, which expired July 1, 1902. Of course, during that and the subsequent period,—well, in fact, during the next eight or ten months,—the price of coal was so high that it was impossible to get it, and this condition——

Commissioner Clements: You mean after the strike began?

Mr. Stevens: Yes, sir.

Mr. Stevens (continuing) continued through the winter. The railway company realized that it had an obligation to perform, and it made the very best arrangement it could to carry out that obligation, without any idea of violating the law in any particular. The fact is that the full rate of $1.45 is charged on this coal and collected from the consignee; but, of course, the company subsequently must make good the loss as between the cost of the coal delivered at New Haven—charging the full freight rate—and the price the contract calls for. It was simply a ques-

tion paying an exorbitant claim, or paying it part in coal and part in money.

Commissioner Clements: Mr. Glasgow, do you want to ask anything on that paragraph?

Mr. Glasgow: Yes, sir.

Mr. Glasgow: Mr. Stevens, you say that the company realized that it had an obligation to perform. You mean with regard to the contract which was made between the Chesapeake & Ohio Railway Company and the New York, New Haven & Hartford Railroad Company in 1896?

Mr. Stevens: Yes, sir.

Mr. Glasgow: That contract was for the delivery of 2,000,000 tons of coal at $2.75 per ton at New Haven?

Mr. Stevens: Yes, sir.

Mr. Glasgow: Whom was that contract made by, Mr. Stevens?

Mr. Stevens: It was made by the President of the Chesapeake & Ohio Railway Company—Mr. Ingalls— with the New York, New Haven & Hartford Railroad Company.

Mr. Glasgow: It was made by the President of that company for the company?

Mr. Stevens: Yes, sir.

Mr. Glasgow: Where did Mr. Ingalls, or the Chesapeake & Ohio Railway Company, expect to get the 2,000,000 tons of coal provided for by that contract of 1896?

Mr. Stevens: He expected to get it from the parties with whom he made the contract.

Mr. Glasgow: He made a contract with operators along his line, or an operator, whichever it may be, for the furnishing of 2,000,000 tons?

Mr. Stevens: Yes, sir.

Mr. Glasgow: Did he afterwards make a contract with another or any other operators?

Mr. Stevens: Not to my knowledge.

Mr. Glasgow: Were the 2,000,000 tons furnished by the operators or operator with whom he first made the contract?

Mr. Stevens: My understanding is that the operator with

whom the original contract was made transferred his obligation to an association or combination of operators.

Mr. Glasgow: Then, did that association of operators undertake to carry out that contract with the Chesapeake & Ohio Railway Company for the delivery of that coal?

Mr. Stevens: Not at the original price.

Mr. Glasgow: What price did they undertake to carry it out at?

Mr. Stevens: Well, the price varied. There were different prices. I could not state absolutely what price each year, but it was somewhere in the neighborhood of 20 cents a ton more than the original contract.

Mr. Glasgow: Was the contract between the Chesapeake & Ohio Railway Company and the operators who were to furnish this coal, or the association of operators, ever attacked as an illegal contract?

Mr. Stevens: No, sir.

Mr. Glasgow: Was there any litigation in the United States court with regard to that?

Mr. Stevens: Not to my knowledge. You will have to ask Mr. Wickham about that.

Mr. Wickham: Not to my knowledge; no, sir.

Mr. Glasgow: I thought there was some question raised about it by some stockholder. Does that refer to that matter at Charleston?

Mr. Wickham: So far as I know, I believe that had no reference to this contract.

Mr. Glasgow: $2.75 was the price of the coal at New Haven under the contract of 1896?

Mr. Stevens: Yes, sir.

Mr. Glasgow: Do you recall what the price was that the Chesapeake & Ohio Railway Company agreed to pay to the operator who was to furnish this coal?

Mr. Stevens: I understood it was 70 cents.

Mr. Glasgow: Do you recall what your published rate at that time on coal was from that District to tidewater?

Mr. Stevens: My recollection is that it was $1.15.

Mr. Glasgow: Do you know what the ocean rates were?

Mr. Stevens: They varied; no settled rate.

Mr. Glasgow: In the neighborhood of a dollar?

Mr. Stevens: Very much less than that at that time.

Mr. Glasgow: Well, what do you think?

Mr. Stevens: I should say not to exceed 60 to 75 cents.

Mr. Glasgow: What is the cost of discharging?

Mr. Stevens: 19 cents. I am under the impression that there was a contract with a certain water transportation company at a price of about 60 cents.

Mr. Wickham: I think there was, but I do not know anything about it.

Mr. Stevens: We have no knowledge of that.

Commissioner Clements: That would take it to where—New Haven?

Mr. Glasgow: The rate of the Chesapeake & Ohio to tidewater, the published rate, at that time was $1.15?

Mr. Stevens: Yes, sir; from the New River District.

Mr. Glasgow: The ocean rates were from 60 to 75 cents?

Mr. Stevens: You may say 75 cents.

Mr. Glasgow: And the cost of discharging 19 cents?

Mr. Stevens: That was about the figure.

Mr. Glasgow: Under the present arrangements, after that contract expired, you pay—Mr. Thomas supplies the coal does he not—for the New Haven coal under this contract?

Mr. Stevens: The Kanawha Fuel Company, of which he is the President.

Mr. Glasgow: Could you recall what he is paid for the coal at his mine?

Mr. Stevens: Your figures are approximately correct.

Mr. Glasgow: The figures in this affidavit?

Mr. Stevens: Yes, sir.

Commissioner Clements: Are the other figures correct? I believe you have already answered in regard to this freight rate.

Mr. Stevens: Approximately, excepting his figure stating

from 60 to 75 cents, because we are collecting $1.45 on that coal.

Mr. Glasgow: Has any of that been collected?

Mr. Stevens: The bills have been rendered, but I am not positive that they have been paid. The bills have been rendered at the full tariff.

Mr. Glasgow: Who would arrange this—the difference between the amount and the excess?

Mr. Stevens: Well, that would be a subsequent adjustment, after the coal is delivered.

Mr. Glasgow: Adjustment with whom?

Mr. Stevens: I should say with the New York, New Haven & Hartford Railroad Company; possibly with the agency that we made the arrangement with; at any rate, we must put that coal to the New Haven Road at $2.75. They can pay whatever it costs, including the freight rate, but we must make good to them in cash the difference—to the New Haven Road—if we follow out the obligation of the contract, which we are endeavoring to do.

Mr. Glasgow: Has any of that been paid by the New York, New Haven & Hartford Railroad Company for freight?

Mr. Stevens: Not yet. I do not know whether they have paid the freight or not. I cannot tell as to that. The bill has been rendered in due course, in the proper way.

Mr. Glasgow: Why is Mr. Wittenburg in evidence in this arrangement, Mr. Stevens?

Mr. Stevens: I simply employed Mr. Wittenburg, who handles it without compensation, to manage the movement of the coal from tidewater to New Haven, arranging for vessels, etc., as he had facilities in that direction which I did not possess.

Mr. Glasgow: He is paid a commission of 5 cents or 10 cents?

Mr. Stevens: No sir; he is not paid any commission. He voluntarily offered to handle it for us without pay.

Commissioner Clements: I do not understand whether you agree or not about this, or whether I understand it correctly. The price of coal is—have you testified?

Mr. Stevens: The price, according to the contract, was $2.75

delivered at New Haven. This contract expired July 1, 1902. We were making very strenuous efforts to wind it up by that date, but unfortunately the coal miners' strike came on us the first week in June, which debarred us from cleaning up the arrangement.

Commissioner Clements: You were through except by about 60,000 tons?

Mr. Stevens: Yes sir. We would not have been over 20,000 tons short at the beginning of July, '02, had not the coal miners' strike intervened, and nothing would ever been heard of the matter. But, unfortunately for us, the strike did occur.

Commissioner Clements: Now, the price was $2.75 per ton, and the rate was $1.15?

Mr. Glasgow: Under the old contract?

Commissioner Clements: Yes, sir.

Mr. Stevens: You can figure it out that the Company was giving its full tariff, and about 60 cents water rate; that would make it about $1.49, and they got, I should say $1.26 freight—more than the published tariff. Your water freight could vary from 60 to 70 cents and still be within the rate as published.

Mr. Glasgow: Mr. Stevens, was your published rate from July 1, 1897, to June 30, 1902, $1.15 from the New River District to Tidewater?

Mr. Stevens: I can only testify as to the rate in effect from February 1, 1900, or April 1, 1900, when the new rates became effective until the present time. The published rates from April 1, 1900, to April 1, 1901, was $1.15 from the New River District and $1.25 from Kanawha. From April 1, 1901, to April 1, 1902, it was $1.25, and $1.35, respectively. Beginning with April 1 this year, it was $1.25.

Mr. Glasgow: From April 1, 1900, to April 1, 1901, it was $1.15?

Mr. Stevens: Yes sir; from the New River District.

Mr. Glasgow: Then, from April 1, 1901, to April 1, 1902, what was it—$1.25?

Mr. Stevens: Yes, sir.

Mr. Glasgow: Then, from April 1, 1902, to July 1, 1902, what was it?

Mr. Stevens: $1.35.

Mr. Glasgow: Now, prior to April 1, 1900, what was it?

Mr. Stevens: I cannot tell. I was not in charge of the traffic at that time.

Mr. Glasgow: You do not know whether it was higher or lower?

Mr. Stevens: I presume it was lower at times. I do not think there was any very stable rate. I left that out because I did not want to testify to something I didn't know anything about.

Mr. Glasgow: Who was the original contract made with?—with the Chesapeake & Ohio Railway Company for the producing of this coal—was the contract made by Mr. Ingalls?

Mr. Stevens: It was made with—you mean with the person—

Mr. Glasgow: I mean with the operator who produced it.

Mr. Stevens: It was made with the.....& Company, the Laurel Creek Coal & Coke Company, and J. L. Berry, who is a land owner.

Mr. Glasgow: Did he decline to carry out that contract that he made?

Mr. Stevens: The contract was transferred to the operators' association.

Mr. Glasgow: What was the price at which he agreed to produce that coal?

Mr. Stevens: 70 cents.

Mr. Glasgow: Did that price continue up to July 1, 1902—70 cents?

Mr. Stevens: No, sir.

Mr. Glasgow: What was the subsequent price charged the Chesapeake & Ohio for that coal?

Mr. Stevens: As I stated formerly, after April 1, 1900, it was about 20 cents more per ton.

Mr. Glasgow: 90 cents? And then after April 1, 1902?

Mr. Stevens: About that; yes sir.

Mr. Glasgow: So that after April 1——

Mr. Stevens: That was on account of their declining to carry out the terms of the contract on account of advance in price of mining, which the contract did not provide for.

Mr. Glasgow: So that after April 1, 1900, the cost of coal was 90 cents at the mines, was it?

Mr. Stevens: About that; yes sir.

Mr. Glasgow: The ocean rates were what? Did they advance then?

Mr. Stevens: I could not tell you.

Mr. Glasgow: Were they less than they had been, more?

Mr. Stevens: I presume they were about that rate. They varied very much, as you know.

Mr. Glasgow: About 60 to 75 cents?

Mr. Stevens: I should say, approximately, that would be correct.

Mr. Glasgow: The cost of discharging was 19 cents?

Mr. Stevens: Yes, sir.

Mr. Glasgow: And your rate was, up to April, 1901, $1.15?

Mr. Stevens: Yes sir. It was $1.15 the first year.

Mr. Glasgow: April 1, 1901, to April 1, 1902, it was $1.25, so that April 1, 1901, to April 1, 1902, the price of the coal which you were furnishing under that contract, according to the estimate you give here, was $2.94—it cost you that at New Haven?

Mr. Stevens: I had not the figures.

Mr. Glasgow: I make that up by this: Coal, 90 cents; ocean rate, 60 cents; discharging, 19 cents; freight rate, $1.25. Now from April 1, 1902, had your rate then increased to $1.35?

Mr. Stevens: No sir. It did not increase until April 1, 1903. I would like to go back over that testimony because there were two years that the rate was $1.25. I desire to make the following statement. April 1, 1901, to 1903, it was $1.25.

Mr. Glasgow: So that from April 1, 1901, to July 1, 1902, the Chesapeake & Ohio Railway Company received on the coal transported under the contract 19 cents a ton less than its published rate, did it not?

Mr. Stevens: Well, according to your figures, it appears that they did not receive the full rate.

Mr. Glasgow: That is all I want to ask on that part of it.

Mr. Wickham: How was that adjusted with the——

Mr. Stevens: That was adjusted by Mr. Orcutt—the coal agency company—who had charge of the matter.

Commissioner Clements: What was the adjustment?

Mr. Stevens: He simply paid over to the railway company what was the net result.

Commissioner Clements: What was left after paying for the coal and transporting it; then what was left out of the $2.75 was paid over to the Chesapeake & Ohio?

Mr. Stevens: Yes, sir.

Commissioner Clements: And, if there was nothing left, there was nothing paid?

Mr. Stevens: Yes sir. But there was a very substantial amount left.

Commissioner Clements: I mean now on these figures?

Mr. Stevens: According to his figures there was a difference of 19 cents between our published tariff and the amount we received, which would mean that we received instead of $1.25, $1.06.

Commissioner Clements: You mean there was always some freight left?

Mr. Stevens: Yes sir; there was very substantial freight left, but it was little less than the tariff as published. I want to say that every agency was familiar with the whole transaction.

Commissioner Clements: What do you mean by that?

Mr. Stevens: What I mean is that Mr. Bullitt and every other coal dealer was aware of that contract, and aware of our situation, and knew that we were not, in that particular matter, receiving our full tariff during that period.

Mr. Wickham: Because of what you considered the obligation of the Chesapeake & Ohio to carry out this contract made by Mr. Ingalls with the New Haven road?

Mr. Stevens: Yes, sir.

Commissioner Clements: We are talking about the original contract?

Mr. Stevens: Yes sir. I do not think that you could properly treat this arrangement for the shipment of 60,000 tons as a new contract; it was simply that the company was fulfilling its obligations, which they insisted upon, and we had to get the coal wherever we could and deliver it to them at the best charge we could.

Mr. Glasgow: When was that made—April, 1903?

Mr. Stevens: Yes, sir.

Mr. Glasgow: The other contract expired July, 1902?

Mr. Stevens: Yes, sir.

Mr. Glasgow: The coal which is delivered under the contract made in April, 1903, is a different kind of coal, is it not?

Mr. Stevens: Yes sir. We could not purchase the New River coal at any price that was at all reasonable; therefore, we had to resort to some other field to purchase the residue and make good our obligation to the New Haven road, which we did at the least pecuniary loss.

Commissioner Clements: You do not regard that as a new contract. I cannot understand what you mean by that. Was there any different written contract made in 1903 to take up the old contract and carry it forward on another basis, in 1903?

Mr. Stevens: Yes sir. In April last, we endeavored to induce the New River operators to fulfill their obligation—it was a moral obligation on their part—on the basis of the old contract, and failing, and realizing that we must produce the coal to the New Haven road, I verbally made this arrangement with the Kanawha Fuel Company to provide the coal.

Commissioner Clements: 60,000 tons?

Mr. Stevens: Yes sir; and made a verbal arrangement with Wittenburg to handle it for us.

Commissioner Clements: What is just the entire substance of that verbal arrangement? Did you have any understanding with the New Haven road?

Mr. Stevens: I first called on the President of the New York,

New Haven & Hartford Railroad Company, and he insisted upon the fulfillment of the obligation. Of course, we had no recourse except to pay a very exorbitant bill that he had rendered, or deliver the residue coal. We chose the latter course as the one producing the least loss to the railway company. We realized it was an unfortunate obligation—one that we would have been glad to escape from, but knowing that we had to either pay his bill, which was something over $100,000, or produce the coal, which would make a loss to us of about $50,000, we chose the latter course. This meant a loss to the company of about $50,000, after collecting their full tariff on the coal. We didn't think that we were in any way violating the law, or we would not have made the arrangement. We thought it was the only course open to fulfill our obligations with the New Haven road. Of course they had an action in law against us if we failed.

Commissioner Clements: Well, then, your verbal arrangement with the coal company was a different concern, different entirely?

Mr. Stevens: Different entirely. The people that we had the original arrangement with repudiated the obligation, and there was no way under the law to compel them.

Commissioner Clements: Why could you not compel them to keep to their contract? You had to keep to yours.

Mr. Stevens: Well, I think the association was not sueable

Commissioner Clements: Was what?

Mr. Stevens: The association that had taken this offer from the original parties; I am under the impression they were not sueable.

Mr. Wickham: I would state that at that time I did not know as to the legal organization of this association of miners. The question as to the right to recover on the original contract was submitted to me, and I was of the opinion that in view of the passage of an act by the General Assembly of West Virginia making it unlawful for railroad companies to buy or sell coal under certain circumstances, suit against them would be waste of time and money.

Commissioner Clements: It was a void contract under the laws of West Virginia.

Mr. Wickham: I was afraid we could get nothing from them. So far as the other contract was concerned, my understanding was that that contract was made between Mr. Ingalls and a representative of the New York, New Haven & Hartford Railroad Company in New York—

Mr. Stevens: The Vice-President of the New Haven road in New York, Mr. Mullen.

Mr. Wickham (continuing): to be performed in Connecticut or Massachusetts, under certain circumstances. There was enough doubt in my mind upon that proposition to make me doubtful about the wisdom of pleading *ultra vires* in the event of a suit by the New Haven road against the Chesapeake & Ohio Railroad Company. My doubt upon this question arose largely from this: That the Chesapeake & Ohio Railway Company primarily is a citizen of the State of Virginia, where its original charter was granted; it is also incorporated under the laws of West Virginia; but the parent company, the principal company, is a Virginia corporation. The Act of West Virginia had no extra territorial effect, so far as the Virginia corporation was concerned, or so far as the State of New York, where the contract was made, or Connecticut, where it was to be fulfilled, was concerned. Furthermore, West Virginia expressly excepted from the inhibition of the law a large number of railroads doing business in West Virginia, which claimed to have by their charters, the expressed privilege of buying and selling coal. It was intrinsically unjust, an injustice occasioned by the power of certain political leaders who exercised sufficient influence, resulting in the preferential benefit of their companies. So far as the Virginia law was concerned, while the charter of the Chesapeake & Ohio Railroad Company did not in expressed terms permit it to buy and sell articles of transportation, yet the statutes of that state in expressed terms permitted the railway company to foster business along its lines in various ways. That policy has been continued for a great number of years in Virginia. There was

enough in the question to make me hesitate about pleading *ultra vires*. It is a plea that carries, as it were, some kind of opprobrium with it, and had *ultra vires* been pleaded the New England market for the coal operators along the line of the Chesapeake & Ohio Railroad Company would I believe have been at once closed against us for all time. There was very grave doubt as to the validity of the contract. As a matter of law, strictly, the contract may be an *ultra vires* contract, but I deemed that upon a question involving so much, that it was within the privilege of the Chesapeake & Ohio Railway Company to say whether or not it would plead *ultra vires*, a transaction involving the business of the road, and which, I believe, would have destroyed the market of the mine operators.

Mr. Glasgow: May I interrupt you?

Mr. Wickham: Certainly.

Mr. Glasgow: The position which from my standpoint is a correct one, is that the question of *ultra vires* as to this contract is not of so much importance in determining its validity as is the fact, according to my views—while the Chesapeake & Ohio may, or may not, have the right—that the contract was prohibited by law on the ground of public policy.

Commissioner Clements: What do you mean, what law do you mean?

Mr. Glasgow: I mean that by the act to regulate commerce the Chesapeake & Ohio could not get out of this—

Commissioner Clements: You do not have reference to the laws of West Virginia?

Mr. Glasgow: No sir. It strikes me that the contract, regardless of the question of the West Virginia statute was made by the Chesapeake & Ohio, and was agreed upon; and very certainly from April 1, 1901, to July 1, 1902, the amount they realized for traffic was below the published rate, and, therefore, was discrimination against every other shipper from that district.

Mr. Wickham: We did not consider it was discrimination.

Mr. Stevens: I want to make the point that when the con-

tract was made in 1896, to take effect the first of July, 1897, the railroad was receiving its full tariff on the figures on which the contract was based. The cost of the coal and the vessel rates at that period did make a very handsome freight rate. The only trouble was that the contract was made to carry for five years, during which period conditions changed entirely. The miners were advanced in pay. Everything went up in proportion. What was a profitable contract at the time it was made, and paid a handsome freight rate, of course made a lower freight rate in 1902.

Mr. Glasgow: Did you state when you made the contract it was an unprofitable one?

Mr. Stevens: I said that from April 1, 1901,—I am not certain as to prior to 1900—certainly from April 1, 1901, to the end of this contract the Chesapeake & Ohio did not realize its published rate.

Mr. Glasgow: The reason for that you say was that it was a five years' contract?

Mr. Stevens: And conditions changed entirely.

Mr. Glasgow: I do not understand the law that a railroad company can make a contract for five years, raise its rates, and justify it by reason of the continuance of the contract.

Mr. Stevens: Is it not a fact that every other railroad that was carrying coal was doing the same thing?

Mr. Glasgow: I do not know.

Mr. Wickham: We submit that the Chesapeake & Ohio got its full freight rate because it paid off this claim to the New Haven road, which would otherwise had to have been paid in money. It is purely a question of bookkeeping, as I understand it.

Commissioner Clements: You mean this claim of $100,000 or more?

Mr. Wickham: Yes sir.

Mr. Glasgow: My reply to that is that you cannot pay a debt by a diminution of your freight rate.

Mr. Wickham: My reply is that if by a device, if it is a *boni fida* transaction, it may be *ultra vires*, but if it be not a device to evade your tariff you can pay a claim in that way.

Mr. Glasgow: Then we have got a clear-cut proposition between us.

Mr. Stevens: There is no company that is doing business that has been a more faithful adherent to its published tariff rates since February, 1900, than the Chesapeake & Ohio, and there has not been one rate made that has not been published with you gentlemen and adhered to; and if we made a reduced rate, we gave you the proper notice. I will challenge anybody to prove that we have made a rate in the last three years that we did not publish with the Commission and did not adhere to.

Mr. Glasgow: I want to say right here that I am perfectly satisfied to take up this one case alone.

Mr. Stevens: I want to show the Judge that it is not a device that we are trying to evade.

Mr. Glasgow: I do not charge that, Mr. Stevens; but in the assertion of this claim the New Haven road is just as culpable as you were. I do not think—I mean that with perfect respect to you—I mean that in my contemplation of it it violated the law, and I do not believe that this is a valid claim, but is one prohibited by policy and by the Act to regulate commerce; and that when you did that, when you undertook to pay a claim by making a less rate than given to other people, you came directly in the teeth of the Act.

Mr. Stevens: Of course, I may be wrong. If we have done wrong, we are ready to be censured. I cannot quite conceive of the difference of paying a claim, whether we pay $100,000 in money to satisfy a claim at factitious prices, or when the conditions have altered and you can get coal at reasonable prices, and we pay it part in money and part in coal. That is our position. If we are wrong, we are ready to be reprimanded and to discontinue the practice.

Commissioner Clements: This is not a question of reprimand. It is just a question of whether the law is being violated, and, if it is, how to stop it.

Mr. Stevens: If we are violating the law we will stop it. We do not want to violate the law. There has never been a concern

that has tried to uphold the rulings of the Commission more than we have.

Commissioner Clements: If this was an illegal contract, if the rebates were allowed, and during its life was unlawful for that reason, was not it equally unlawful to resurrect it by this or by any other means? This is probably no more unlawful than if you had paid it in cash. Isn't it the same thing in substance whether you paid it in one form or the other? It is paid to a consignee interested in freight rate and in the property and who gets it in competition with other dealers.

Mr. Wickham: We were concerned with this very serious proposition and the result. If we could have compromised on the payment of 50 per cent.—if it is a *bona fida* claim as we recognized it was—it does not seem to me that there can be any difference between our delivering the New Haven road a hundred thousand dollars or $50,000. Let us get out of this the best way we can.

Mr. Glasgow: My position would be that it would be equally unlawful for you to have paid that $50,000 in money originating out of a contract in which the New Haven road was in the same position that the Chesapeake & Ohio was.

Mr. Wickham: That was a question involving the charter of the railroad company. The statute law of West Virginia, the law of New York, and the law of Connecticut, and the Federal law—we always have understood that a *bona fide* claim for damages could be adjusted if it was not used as a device, and we did not want to cut a rate or make some device to evade the law. In this case we say we have done everything we can. There is not a coal man on the Atlantic Coast that did not know of this transaction; everybody knew about it; it was no secret; and we would have adjusted a damage claim the best way we could to the interest of all concerned.

Mr. Stevens: Do I understand Mr. Glasgow to say that it was not different whether we had paid the $100,000 claim for damages, or adjusted part in coal and part in cash?

Mr. Glasgow: I do not recognize any difference between the

two transactions. I think there is a very clear distinction; I think they are both equally wrong.

Mr. Stevens: That is what I want to bring out. That we should have done neither?

Mr. Glasgow: Exactly.

Mr. Stevens: That is a clear-cut proposition where we are up against a civil transaction.

Commissioner Clements: There are two ways of evading this law in regard to published tariffs—one is to takes less than the published rate originally, another is to collect and pay back freight in the way of rebate, and this has been many times done in the name of a damage claim.

Mr. Wickham: This claim was not a falsely made claim, but the settlement of a *bona fide* claim.

Commissioner Clements: But in fact there is as much discrimination against other parties as if it had been a device, because in its effect it does not make any difference.

Mr. Glasgow: Here is a claim which the law, by the enactment of the Elkins Law——. This new contract was made, and right in face of it, immediately after its enactment, the New York, New Haven & Hartford Railroad Company makes a claim against you, which originated in a contract by which you were giving them a less rate on coal (by you I mean the Chesapeake & Ohio) than it gave to other people; and immediately following the Elkins Act this new arrangement was made upon a demand from them growing out of a contract which the law expressly, by first enactment in 1887 and re-enactment just before the arrangement was made, absolutely prohibited.

Mr. Stevens: I want to state that the delivery of this 60,000 tons of coal which was due on this old contract made no difference with any other shipper that had coal to sell, from the fact that the New Haven road immediately our contract expired in July, 1902, made a new contract with the West Virginia Central & Pittsburg for a term of five years for a quantity of coal aggregating, I believe, 500,000 tons a year, so that they had their coal supply secure. They simply were securing a pound of flesh from us to get the last 2,000,000 lot that we had.

Commissioner Clements: And now they have a similar arrangement with the same company?

Mr. Stevens: I understand so.

Mr. Glasgow: They did not make this demand on you until coal went very high?

Mr. Stevens: All during the months of last year when we have the strike on our hands.

Mr. Glasgow: After the contract closed—that is, July 1, 1902, no demand was made on you for damages until some time during the winter of 1902-1903?

Mr. Stevens: They demanded the coal. I answered that it was simply impossible to get the coal, to get coal even for our own locomotives; and the thing drifted along. We afterwards received a bill from the New Haven road for $100,000, charging up 60,000 tons of coal bought by them at these high prices, which we could not consider; and this is the way we tried to carry out the contract and do as little damage to the railway company as possible. We had no idea of evading the law, or no idea of giving a preferential rate to anybody. The thought never entered our head that it would.

Commissioner Clements: Just illustrate how this works out. This is informal, but we are trying to get at the effect of these things, not only in this instance, but in others. We had a case a few years ago where the Chicago Great Western road had organized a corporation company called the Iowa Improvement Company, and that Improvement Company bought grain in the West and shipped it, and the Chicago Great Western owned all the stock in that Improvement Company; and so, as Mr. Wickham has already stated, it was a mere question of bookkeeping.

They testified that they paid the rate, and doubtless they did pay the rate, or all that was left after the purchasing, handling, and delivery of the grain was taken care of. If it was more the freight rate was less, as it generally was.

Mr. Stevens: You ought to take into consideration the business conditions and the intent of the parties.

Commissioner Clements: You take into consideration the con-

ditions so far as some things are concerned, but so far as carrying out some things is concerned, you have to take account of the intent more than the conditions. Suppose this other contract is, as Mr. Stevens has understood it was, with another company and for five years more. Who can tell but that the price of coal will go up and the rates will be changed in such a way as it will be impossible to carry them out except by a cut in freight rates.

Mr. Wickham: Is it not possible to make some assurances to an industry about to be established on your line that he will have certain freight rates?

Commissioner Clements: You may contract for freight rates, but you have to let everybody else have the same rates.

Mr. Stevens: I want to say that while it is true that railway companies were interested in contracts like this in past years, in the last three years the Chesapeake & Ohio Railway Company has had nothing to do with anything beyond tidewater, and whatever coal was shipped was shipped there at a rate that is published and open and aboveboard, and they had nothing to do with the sale of coal beyond Newport News. I think Mr. Glasgow——

Mr. Glasgow: I have no reason to think to the contrary, sir.

Mr. Stevens: We are simply endeavoring to get rid of an old obligation, and no similar obligation has been entered into in the last three years.

Commissioner Clements: At this recent coal investigation in New York we found everything in there; that they have a right to buy and sell coal—they appeared to have, so far as the State law is concerned. But isn't it true that whatever a State law provides or prohibits must give way to an Act of Congress; that so far as interstate commerce is concerned there must be equal treatment, which the law requires?

Mr. Stevens: I am one of the railroad managers greatly in favor of the Interstate Commerce Commission and its power to regulate these matters, and believe that great good has resulted from their action, and we are willing and ready and anxious to live under the law.

Commissioner Clements: This is pleasant, and we are not particularly anxious to go out of our way to get you or any one else, in fact. We are charged in a serious way with the duty of enforcing this law, and it is a question whether or not if in an isolated case, and it comes over from an unfortunate period of general lawlessness—when I say that I am not talking about your company in particular, for they seem all to have got into this condition, and very naturally if one does it the others will and must, as you know better than I do—if the law is to be enforced at all it must be enforced in regard to all, because if any one is allowed to deviate from it the others are compelled to do so or suffer.

Mr. Stevens: When I said the West Virginia Central & Pittsburg, the contract may have been with the Davis Coal & Coke Company, which is a creature of the West Virginia Central. I know that the contract was made, and at a price we could not meet.

Commissioner Clements: If there is not a stand taken somewhere, there will be no end to it.

Mr. Stevens: I do not think there is going to be any more contracts of this kind made by any railroad company.

Mr. Glasgow: The coal shipped under this arrangement goes to Newport News, and is there shipped direct to New Haven?

Mr. Stevens: Yes, sir.

Mr. Glasgow: By a barge or vessel?

Mr. Stevens: Any coastwise craft.

Mr. Glasgow: Either barge or vessel?

Mr. Stevens: Yes, sir.

Mr. Glasgow: The published rate of $1.45 would apply on this coal, provided the circumstances that you have related do not take it out and make it an exception? Do you understand my question?

Mr. Stevens: The full tariff rate will be collected on this coal. If there is any loss to the railroad company, there will be a loss in adjusting this matter. It will not be taken out of the rate; it will be deducted as a charge against income, as a claim that

has been adjusted and charged up against the deduction from income.

Mr. Glasgow: I do not know that you understand my question. Upon this coal the rate of $1.45 would apply unless this case is an exception to be taken out by the circumstances you suggest?

Mr. Stevens: Yes sir. On all coal shipments from the Kanawha District the rate of $1.45 is being charged and collected not only on other shipments, but on these shipments. But I say we have got a claim to meet after the thing is adjusted which we will handle by a deduction from income, and not interefere with the rate.

Commissioner Clements: It will mean the same thing in the end?

Mr. Stevens: Yes, sir.

Commissioner Clements: There is no difference in substance, is there?

Mr. Stevens: No; the company has to stand it.

Mr. Glasgow: Then, as I understand the figures given on page three of the affidavit, which make up the sum total of $2.52, are substantially correct—on page three at the bottom?

Mr. Stevens: You have got in one item, commission to broker, which should be eliminated; and my information is that the ocean rates are considerably less than a dollar; that the items as respects the cost of the coal and the discharging are correct. The others are incorrect.

Mr. Glasgow: Well, you say the five cents should be eliminated. What should be deducted from the dollar to make it what you think is correct?

Mr. Stevens: Well, I have not the absolute information as to ocean rates, but my understanding was that the rate would not be in excess of 90——

Mr. Glasgow: Probably considerably less?

Mr. Stevens, (continuing) and in all probability less than that.

Mr. Glasgow: Not below eighty?

Mr. Stevens: There were no figures stated except as I have said.

Mr. Glasgow: Did you not have to figure on that in arriving at a conclusion as to whether you would furnish this coal?

Mr. Stevens: The vessel rate would not exceed 90 cents, was my understanding; would be as much less as the vessels could arrange for.

Commissioner Clements: So that these figures, while varying from time to time on account of the ocean rate, would in no case be sufficient to pay the published freight rate?

Mr. Stevens: No, indeed; that is, if you deducted it from the rate; if we make the deduction from the rate, no sir.

Mr. Glasgow: Do you know, Mr. Stevens, what the current ocean rate now is?

Mr. Stevens: I have no information, no sir, but I think it is about 90 cents to Boston; New Haven would be a little less.

Commissioner Clements: Any other questions you want to ask on any part of this?

Mr. Glasgow: No sir.

Commissioner Clements: Mr. Wickham, have you any further questions you want to ask?

Mr. Wickham: No sir, we are here to give the Commission all the information in our power.

Mr. Stevens: I want to say that on page three—the new contract was made between the New Haven road by Mr. Wittenburg. We do not want to accept that as a correct statement because the New Haven road did not make a new contract with anybody.

Commissioner Clements: You mean to state that it is not a new contract?

Mr. Stevens: It reads thus: "And during the winter of 1902-1903 the President of the Chesapeake & Ohio Railway Company arranged a new contract between the New York, New Haven & Hartford Railroad Company, through a coal broker, by name Wittenburg, and a coal operator in the Kanawha District by the name of Thomas." The railway company simply

were notified by the New Haven road that they insisted upon the delivery of that coal, and that if it was more advantageous to us to ship Kanawha coal than New River coal, they would accept Kanawha coal. Thereupon, after failing to make an equitable arrangement with the New River people, I did arrange through Mr. Thomas to furnish that coal, and also arranged with Mr. Wittenburg to have the facilities and vessels, and see that it was shipped, as he was their eastern coal agent. This is why the arrangement was made with Mr. Wittenburg.

Mr. Glasgow: When the arrangement was made in April, 1903, the class of coal covered by the agreement with the New Haven road was a different coal; the broker who was to look after it for you was not a party to the other contract?

Mr. Stevens: No sir.

Mr. Glasgow: The parties who were to deliver the coal, were to produce it and deliver it, were different parties from the former contract, were they not?

Mr. Stevens. From a different field. The fact is that, as I have stated, an equitable price could not be reached with the New River operators. Thereupon, the President of the New Haven road said that, as he had used some Kanawha coal during the winter and had thought well of it, if we could make better arrangements as to the price for that coal, he had no objection to accepting it in lieu of New River coal.

Commissioner Clements: How much of these things are in writing—anything but the original contract between Mr. Ingalls and the New Haven road? Is there any written agreement about it anywhere along the line?

Mr. Stevens: No sir, not to my knowledge.

Mr. Glasgow: Was there any contract made in 1903?

Mr. Stevens: No sir; all arrangements were made orally.

Commissioner Clements: There was no correspondence about it?

Mr. Stevens: No sir.

Mr. Glasgow: When did they first render a bill to you for damages?

Mr. Stevens: Sometime in the winter—January 12.

Mr. Glasgow: At that time the price of coal had gone up very high in New England, had it not?

Mr. Stevens: Yes, sir.

Mr. Glasgow: The railroads in New England, I suppose, like the railroads elsewhere at that time, were looking to every point at which they could get coal, were they not, at a reasonable price?

Mr. Stevens: Yes sir. The railroads in New England, as well as elsewhere, were looking for coal, due to the fact that the people with whom they had contracts were not filling those contracts. The New England roads had ample contracts for coal, but the contractors failed to deliver the coal as required, and they bought the coal on the market at high prices; and some of that they charged up to us.

Mr. Glasgow: So that they were looking around anywhere to get coal at as reasonable prices as possible.

Mr. Stevens: Yes sir. We bought some fuel coal from the Northwestern operators, because at the time——

Commissioner Clements: How much do you lack now of having fulfilled your obligation?

Mr. Stevens: We delivered in May 17,000 tons, and in June 16,000, that would make 33,000, leaving about 27,000 yet to deliver—23 and a fraction.

Commissioner Clements: Was there some correspondence about that bill they rendered you? Did you answer that in writing?

Mr. Stevens: The bill was addressed to our Comptroller, and I simply asked him to acknowledge receipt and say—my recollection is that I told him I would confer personally with Judge Hall in regard to it.

Commissioner Clements: With whom was the arrangement made with on behalf of the New Haven road?

Mr. Stevens: The original or the recent arrangement?

Commissioner Clements: The recent arrangement.

Mr. Stevens: Judge Hall, President.

Commissioner Clements: And the original contract was made between the President of the company?

Mr. Stevens: Mr. Ingalls, the President of the Chesapeake & Ohio Railway Company and Mr. C. S. Mullen the then Second Vice-President of the New Haven road.

Commissioner Clements: Is there any objection to your giving us a copy of that contract? I suppose you have a copy of it, a copy of that original contract and a copy of this bill that has been rendered here.

Mr. Wickham: We shall be very happy to furnish it; they will be furnished.

(The same is hereto attached and marked "Exhibit A")

Commissioner Clements: They will throw some light on this subject and we should like to have them. It is only for the purpose of supplementing all you say, of course. It shows better what you are talking about.

Mr. Stevens: Here is a copy of the freight bill that we rendered on June 6th, 1903, for the freight on coal in May. I do not know whether that bill has been paid or not, because I was absent from Richmond when your summons came; but it was rendered June 6th, and should have been paid, and I have no doubt it has been.

(The freight bill referred to is hereto attached and marked "Exhibit B.")

Mr. Glasgow: Mr. Stevens, I want to ask you about that contract that you say was made with the West Virginia Central. What character of contract was that?

Mr. Stevens: Well, now, I corrected myself by saying that I did not know that it was made with the West Virginia Central, but that it was made with the Davis Coal & Coke Company, which is an adjunct of the railroad company. That I have from heresay, that such a contract was made.

Mr. Glasgow: What character of contract was it?

Mr. Stevens: Five-year contract for 500,000 tons per year.

Mr. Glasgow: At what price?

Mr. Stevens: I do not know.

Mr. Glasgow: The contract was made with the New Haven road.

Mr. Stevens: Yes sir; that was my information, and it was at a price that neither the Norfolk & Western or the Chesapeake & Ohio fields could reach because if it had been at even figures, we, or our operators, would have had the first call on equal prices; that I know.

Mr. Glasgow: In the ordinary shipping of coal on your line, how often do you require freight to be paid on the coal?

Mr. Stevens: The regular shippers who are reliable we sometimes render bill to monthly and sometimes weekly.

Mr. Glasgow: Was not the arrangement, Mr. Stevens, as to this matter, that Mr. Wittenburg was not to collect or pay any freight, or the New Haven road were not to pay any freight, until the whole delivery had been made, and then an adjustment was to be made?

Mr. Stevens: There was no talk upon that point, at all, to my recollection.

Mr. Glasgow: In the ordinary shipping of coal through Mr. Wittenburg, Mr. C. J. Wittenburg, does he pay the freight?

Mr. Stevens: Yes sir. I do not know whether he has paid any freight on this coal; I do not know whether that bill has been paid or not; I did not have that information because I was in Richmond when this matter came up.

Mr. Glasgow: I notice the date of the bill is July 6th; but was not Mr. Wittenburg given to understand that he would not be required to pay any freight on this coal at any time?

Mr. Stevens: I do not know of any such understanding; I have no recollection of any such understanding.

Mr. Glasgow: Was he required under the arrangement you made to collect the money from the New Haven road?

Mr. Stevens: I do not think there was anything said about it. I simply made the arrangement in a verbal way in his office in five minutes. I was on the point of leaving on a western trip, and the details were to come up and be arranged later. They went ahead and shipped the coal while I was absent.

Mr. Glasgow: You did not expect Mr. Wittenburg to pay this freight without collecting it from the New Haven road, did you?

Mr. Stevens: Certainly it should be paid by Mr. Wittenburg.

Mr. Glasgow: I want to know because my information is that the arrangement was that no freight on this coal should be paid until the whole thing had been delivered, the whole amount delivered, and that no freight had been paid on the 25,000 tons already delivered up to this time, and that the arrangement was that no freight was to be paid on this at all until the whole amount was delivered, and that there was to be some adjustment, —that is my information.

Mr. Stevens: I do not see what bearing that has on the matter. I do not recollect any conversation passing on that subject; there might have been; but I do not see what this has to do with the point at issue.

Mr. Glasgow: That is my information. I should just like to know whether it is correct.

Mr. Stevens: I never had an arrangement yet that somebody didn't have a different construction of.

Mr. Glasgow: That is my understanding of it from the information I have gotten. I should like to know whether that is correct.

Mr. Stevens: You can say a great many things in gossip.

Mr. Glasgow: That is quite true. But isn't it a fact, Mr. Stevens?

Mr. Stevens: I do not know.

Commissioner Clements: There has been an adjustment?

Mr. Stevens: Yes, sir.

Mr. Glasgow: Do you know when this bill was made out?

Mr. Stevens: No sir.

Mr. Glasgow: You do not know whether it has ever been delivered to Mr. Wittenburg?

Mr. Stevens. No sir. Mr. Wickham got it from the Comptroller's office in my absence; I was not there.

Commissioner Clements: Is there anything further you want to say about this, Mr. Stevens?

Mr. Stevens: I think I have stated our case about as fully as I can, and have taken up much of your valuable time.

Commissioner Clements: We are obliged to you for coming here so promptly.

At 12:30 P. M. the taking of testimony was completed.

IN THE CIRCUIT COURT OF THE UNITED STATES

IN AND FOR THE WESTERN DISTRICT OF VIRGINIA.

Interstate Commerce Commission
v.
The Chesapeake & Ohio Railway Company and The New York, New Haven & Hartford Railway Company. } In Equity.

ORDER.

This cause coming on to be heard on the petition of the Interstate Commerce Commission and exhibits therewith, to-wit: the affidavit of W. C. Bullitt, the order of the Interstate Commerce Commission of July 1st, 1903, and the testimony of George W. Stevens, President of the Chesapeake & Ohio Railway Company, taken before the Commission on July the 3rd, 1903, this day filed by direction of the Attorney General of the United States; and on the motion of the petitioner for a temporary injunction; and said petition and exhibits therewith having been read, and the court being fully advised in the premises, doth order that the motion be set down for hearing on Friday, July the 31st next, at 2:30 o'clock P. M. at the United States Court House, Lynchburg, Virginia, and that until that date, or the further order of this court, the defendant the Chesapeake & Ohio Railway Company, its officers, agents and servants, and they all and each and every one of them are hereby enjoined and restrained from

further acting under and enforcing and executing in any manner whatsoever any agreement to transport over the defendant's railroad, or any part thereof between the States, any coal or any other interstate traffic at any greater or less rate than the rates named for such service in defendant's established schedule or tariff in force on its line, and at the time said traffic is transported on file with the Interstate Commerce Commission, or in any way practising discrimination or departing from their schedule or tariff rates in carrying any of said coal or other traffic between the states; and the said Chesapeake & Ohio Railway Company, its officers, agents, and servants be and they are enjoined from hereafter agreeing with any shipper or any person to transport coal or any other interstate traffic at any other or different rate than such as may be provided for in its schedules or tariffs as filed and published according to law, and they are also enjoined and restrained from paying any rebate or making any concession whatever in the rates and charges of the Chesapeake & Ohio Railway Company whereby any such traffic transported by it over its railroad, or any traffic in the transportation of which the Chesapeake & Ohio Railway Company may participate, shall be carried by it in whole or in part at any rate different from the established rate at which said traffic shall be transported then on file with the Interstate Commerce Commission according to law.

And the defendant the New York, New Haven & Hartford Railroad Company, its officers, agents and servants, and each and all of them be and they are hereby enjoined and restrained from accepting or receiving any rebate, concession or discrimination in respect to the transportation of coal or any other interstate traffic carried for it, or in which it is interested, or from soliciting, accepting or receiving any rebate, concession or discrimination in respect to the transportation of any property in interstate traffic, or from soliciting, accepting or receiving any rebate, concession or discrimination in respect to the transportation of any property in interstate commerce whereby any advantage is given to, or discrimination is practiced, in its favor.

It is further ordered that copies of this order be served on the defendants the Chesapeake & Ohio Rialway Company and the New York, New Haven & Hartford Railroad Company respectively, returnable the 31st day of July, 1903.

HENRY C. McDOWELL,
District Judge.

July 13, 1903.

IN THE CIRCUIT COURT OF THE UNITED STATES

IN AND FOR THE WESTERN DISTRICT OF VIRGINIA.

Interstate Commerce Commission
v.
Chesapeake & Ohio Railway Company and The New York, New Haven & Hartford Railroad Company. } In Equity.

ORDER.

On the motion of the New York, New Haven & Hartford Railroad Company, and with the consent of the plaintiff in this cause and of the defendant, the Chesapeake & Ohio Railway Company, it is ordered that the motion heretofore set down for hearing on Friday, July 31st, be continued to Thursday, October 1st, 1903, at 10:30 o'clock A. M. at the United States Court House, Lynchburg, Virginia, and that until that date, or the further order of the court, the temporary injunction heretofore awarded in this case be continued in force.

It is further ordered that the defendants herein file in the Clerk's office of this court their answers on or before September 10th, 1903.

HENRY C. McDOWELL,
District Judge.

July 27, 1903.

IN THE CIRCUIT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF VIRGINIA.

Interstate Commerce Commission
v.
Chesapeake & Ohio Railway Company and New York, New Haven & Hartford Railroad Company. } In Equity.

ORDER.

It is by consent of parties, ordered that the motion heretofore set down for hearing on October 1st, 1903, be continued to Wednesday November 4th, 1903, at 10:30 A. M. at the United States Court House, Lynchburg, Virginia, and it is further ordered that the temporary injunction heretofore awarded in this case be continued in force until the further order of this court.

HENRY C. McDOWELL,
District Judge.

September 30, 1903.

IN THE CIRCUIT COURT OF THE UNITED STATES
IN THE WESTERN DISTRICT OF VIRGINIA.

Interstate Commerce Commission
v.
Chesapeake & Ohio Railway Company and New York, New Haven & Hartford Railroad Company. } In Equity.

ORDER.

It is ordered by the Court that the motion heretofore set down for hearing on November 4, 1903, be, and the same is, hereby continued to Tuesday, December 1, 1903, at ten o'clock A. M. at the United States Court House, Lynchburg, Virginia, and it is

further ordered that the temporary injunction heretofore awarded in this case be continued in force until the further order of this Court.

It is further ordered that the defendants in this case file such affidavit and documentary evidence as they may desire to file on or before the 10th day of November, and that the plaintiff file such counter affidavits as it may desire, or cross-examine such of defendants' witnesses as it may desire to cross-examine on or before the 20th day of November, 1903.

HENRY C. McDOWELL,
District Judge.

Enter October 26, 1903.

IN THE CIRCUIT COURT OF THE UNITED STATES,

WESTERN DISTRICT OF VIRGINIA.

The Interstate Commerce Commission, Petitioner,
v.
The Chesapeake & Ohio Railway Company, and The New York, New Haven and Hartford Railroad Company, Defendants.
} On Petition

The separate answer of the Chesapeake & Ohio Railway Company to the petition of the Interstate Commerce Commission.

This respondent says that it is true that it is engaged in freight traffic between the Kanawha District in West Virginia and Newport News in the State of Virginia, but it is not true that it is engaged in carrying freight at less than its published rates on file, or that it is committing discrimination forbidden by law as in said petition alleged.

This respondent specifically denies that it made a contract during the Spring of 1903, to carry a large amount of coal, to-wit, 59,966 tons, from the Kanawha District of West Vir-

ginia to tidewater at Newport News in the State of Virginia, for shipment to New Haven for the New York, New Haven & Hartford Railroad Company, in violation of its published tariffs or in violation of the Act to Regulate commerce and the various amendments thereto, or that it ever has had, or now has, any purpose or design to transgress or evade the provisions of said act.

This respondent further answering says it is true, as alleged, that on December 3, 1896, it entered into a writen contract with the New York, New Haven & Hartford Railroad Company, a substantial copy whereof is annexed to the petition in this cause, whereby it agreed to sell and deliver to the latter company 2,000,000 tons of bituminous coal in such quantities as might be called for, from July 1, 1897 to July 1, 1902, deliveries not to exceed 400,000 tons annually, at the price of $2.75 per ton, New Haven basis; but notwithstanding the allegation of the petition that this contract is illegal and void, this respondent denies that the validity of said contract is an Interstate Commerce question, or a proper subject of adjudication in this proceeding.

Further answering this respondent says that deliveries were made under said contract and would have been substantially completed in accordance with its terms, had not the coal miners strike intervened which caused almost an entire cessation of coal shipments upon the line of this respondent, and caused a shortage undelivered under said contract on July 1, 1902, of 59,966 tons. Subsequently this respondent endeavored to induce the New River operators, who had been taking care of this contract theretofore, to continue to supply the coal, but they refused to do so. On January 12, 1903, the New York, New Haven & Hartford Railroad Company rendered a bill against this respondent amounting to $103,910.69 for the excess over contract price paid by the former company for bituminous coal "purchased outside to make good shortage on contract," a copy whereof is hereto attached marked Exhibit "A., C. & O." This respondent, recognizing its obligation arising under said contract, and desiring in good faith to discharge it, arranged verb-

ally with the New York, New Haven & Hartford Railroad Company to deliver to it 59,966 tons of Kanawha coal, the deficiency under its contract as aforesaid, instead of New River coal, the latter company consenting to accept the lower grade coal and to release its claim for said $103,910.69; and therupon, in pursuance of this understanding, a verbal arrangement was made with the Kanawha Fuel Company, of which J. R. Thomas was President, and the C. & O. Coal and Coke Company, of which C. J. Wittenburg was President, to complete the delivery of said 59,966 tons of coal as aforesaid. When this arrangement to complete the delivery of coal was made nothing was said as to the details of its execution, but the understanding of the President of The Chesapeake & Ohio Railway Company, who negotiated this matter, was that the C. & O. Coal and Coke Company would handle the transaction, and this respondent was to make good to it the difference between the cost of delivering the coal at New Haven, including the full tariff rate to Newport News, and the price of $2.75 per ton to be paid for the coal by the New York, New Haven & Hartford Railroad Company. The C. & O. Coal and Coke Company was not engaged in this transaction in selling and delivering coal in the usual course of business, or in selling coal to the New York, New Haven & Hartford Railroad Company, but on the contrary it was without charge assisting this respondent to discharge its obligation to the latter company.

By this arrangement with the New York, New Haven and Hartford Railroad Company this respondent settled (as shown by the petition) a liquidated claim against it for damages amounting to $103,910.69, which amount should be taken into account in any just estimate of the consideration to be received, on the one side, and to be paid on the other, for the coal furnished and to be furnished as aforesaid; but, notwithstanding the fact that the charge of discrimination in freight rates set up in the petition is predicated solely on the price of said coal, the petition takes no account of said claim as a part of the consideration. The arrangement involved no illegal advantage to either this respondent or to the New York, New Haven and

Hartford Railroad Company, and imposed no injury on any shipper of coal over the lines of this respondent. The latter company, which is alleged in the petition to be the beneficiary of the discrimination in freight rates therein charged against this defendant, was not a shipper of coal, and had no property in the coal alleged to have been carried, or to be under contract for carriage until the same had been, or should be, delivered into its coal bins at the several points on its line, according to the requisitions of its Purchasing Agent; and the said company, being a buyer of coal delivered or to be delivered at a fixed price, had no interest in the freight charges thereon, and could not be benefited or injured by the reduction or increase of said charges.

The actual shipper of the coal in question, as appears from the petition, was an operator in the Kanawha District of West Virginia, and though the petition alleges and charges that this respondent, in arranging for said coal to be furnished by the Kanawha Fuel Company and the C. & O. Coal and Coke Company as aforesaid, committed a discrimination "against all other coal produced in the Kanawha District of West Virginia," it does not make said companies parties to this proceeding, or allege that there was any discrimination in their favor, or that they derived any illegal benefit or advantage from said arrangement over any other operators in the same district, or that any shipper of coal over the lines of your respondent was thereby unlawfully discriminated against; and this respondent denies that said companies derived any such illegal benefit or advantage from said arrangement or that any shipper of coal over its lines was injured thereby.

It appears accordingly from said petition that the unlawful discrimination alleged did not benefit its alleged beneficiary, the New York, New Haven and Hartford Railroad Company, or the operator or any other person by or through whom the coal in respect to which the discrimination is charged, was furnished; and that the alleged unlawful discrimination did not injure any operator in the same district or elsewhere on the lines of your respondent.

Further answering this respondent says that on the 20th. of June 1903, an account at the full published rate, bearing date June 6, 1903, was sent to the C. & O. Coal and Coke Company for the shipments which had been made in May, amounting to 17,708 tons, and a further account at said full published rate for shipments made in June, amounting to 16,207 tons, was sent to the C. & O. Coal and Coke Company on July 2, 1903. Copies of these accounts are filed herewith marked respectively "B., C. & O." and "C., C. & O." The former of these bills, which was rendered before this proceeding had been instituted, or was anticipated, confirms the foregoing statements as to the nature of the transaction in question. These bills will be collected or accounted for in the settlement for said coal.

Further answering this respondent says that the allegation of the petition that the rate charged for the transportation of this coal was 29 cents per ton was misleading, and does not correctly state the transaction in that it quotes erroneous figures, and does not take account of the contract in its entirety, or of the settlement of a liquidated claim against it for damages amounting to $103,910.69 thereby assuming as true what it was designed to prove.

It is true that the cost of this coal at the mines was	$1 28
That the regular freight tariff from the Kanawa District to Newport News for shipment beyond the Capes was	1 45
That the ocean rates varied, but upon the coal carried as set out in exhibits "B" and "C" C. & O. said ocean rates averaged . . .	88½
That the cost of discharging was	19
Total	$3 80½
against which is to be credited the price of coal named in the contract	2 75
leaving the loss to be adjusted	$1 05½

Now that this loss was not a tariff matter is demonstrated when the attempt is made to deduct from the rate of $1.45 the $1.05½, because no rational railroad manager, in order to carry 59,966 tons of coal would attempt a device of this kind in order to carry said coal at 39½ cents per ton. If this had been a device to carry at less than the published tariff rate no rational manager would have made a cut in the rate of $1.05½ (of nearly three fourths) at a time when he might have practically commanded the general market at a far less reduction.

Further answering this respondent says that the contract between it and the New York, New Haven and Hartford Railroad Company was not in any wise hidden or concealed, but on the contrary was known, or might have been known, to every coal dealer on the Atlantic Coast; it was known to W. C. Bullitt long before he set on foot this proceeding against your respondent; it was no secret; no question was ever raised against it; all fully understood that this respondent was not in fact discriminating, nor intending nor attempting to discriminate in its freight charges, nor intending nor attempting to haul coal at less than its published rate, and that this respondent, by the transaction which is made the basis of this complaint, was simply adjusting and settling an ascertained claim against it amounting to $103,910.69 arising out of said contract, which claim this respondent recognized as valid and binding.

Further answering this respondent says that W. C. Bullitt, on whose complaint this proceeding was inaugurated, is not and has never been a coal operator or interested in coal traffic over its lines, and therefore he could not be prejudiced by the transaction of which he complains.

Further answering this respondent says that in order to protect itself against any loss on its contract with the New York, New Haven and Hartford Railroad Company, it made an arrangement with the New River operators to furnish this coal at 70 cents per ton at the mines, and entered into a contract with the Atlantic Transportation Company for a water rate of 50 cents per ton from Newport News to New Haven; this respondent

says that if these contracts had been carried out its contract with the New York, New Haven and Hartford Railroad Company would have been vastly to its pecuniary advantage.

Further answering this respondent says that the contract between it and the New York, New Haven and Hartford Railroad Company, at the time it was made, and for a considerable portion of its term, yielded a profit over all expenses more than sufficient to fully cover the freight charges of this respondent, and this profit would not have been affected had not the New River operators and the Atlantic Transportation Company failed to carry out their contracts with this respondent; and this respondent says that if reference be had (as should be) to the entire contract and the benefits to be derived therefrom by this respondent, there has been no unjust discrimination in what it has done.

Further answering this respondent says that the allegations in the petition are not, as alleged, substantially in accord with the statements of Geo. W. Stevens, President of the respondent company, as set out in Exhibit No. 1 filed with and made a part of said petition, but that the allegations contained in this answer are in accord with said statements.

This respondent in conclusion denies that it has violated the Interstate Commerce law, or evaded the same by any device or other means whatsoever, or that it has given any undue advantage or practiced any unjust discrimination by what it has done, and it respectfully submits that the said petition fails to state any sufficient cause of action against this respondent.

Wherefore this respondent prays that the said petition be dismissed.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,
By GEO. W. STEVENS,
President.

Attest:
C. E. WELLFORD,
Secretary.

State Virginia,
City of Richmond, } ss.

George W. Stevens being duly sworn deposes and says that he is the President of The Chesapeake and Ohio Railway Company, and that the statements contained in the foregoing answer are true to the best of his information, knowledge and belief.

GEO. W. STEVENS.

Sworn to and subscribed before me in my city aforesaid this 8th. day of September 1903.

RO. H. GILLIAM,
Notary Public.

My Commission expires on the 8th. day of May 1904.

EXHIBIT "A," C. & O.

THE NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY.

Accounting Department.

Audit No. 74387 a,
Registered in Dec. 1902,
Ledger Folio 2999.

New Haven, Conn., Jan. 12, 1903.

Chesapeake & Ohio R. R.

To The New York, New Haven & Hartford Railroad Co. Dr.

(Please remit the amount and send this bill with it to the Treasurer, New Haven, Conn. If further information is required, address Auditor of Disbursements, New Haven, Conn.)

For amount paid for bituminous coal purchased outside to make good shortage on contract.

Yearly quoto of contract ending July 1, 1902,	400,000 tons
Shortage on yr. ending July 1, 1901,	31,314 tons
Total tonnage for delivery during year	431,314 tons

Tonnage for			
Boston deliv'y,	75,000 tons		
Providence "	217,000 tons		
NewHaven "	108,000 tons		
Shrtge from previous yr.			
Prov. ⅔ "	20,658 tons		
Shrtge from previous yr.			
New Haven ⅓	10,656 tons		
Total		431,314 tons	
Tonnage due on or before Jan. 1, 1902, ½ yr.		215,657 tons	
Shipments during same period Boston	34,266 tons		
Prov.	107,990 tons		
N.Hav.	53,858 tons		
Total,		196,114 tons	
Shrtge ½ yr. to Jan. 1, 1902,		19,543 tons	
Boston ½ yr. tonnage due,	37,500 tons		
Boston ½ yr. shipments	34,266 tons		
Bal. due,	3,234 tons@$4.48	$13,448.32	
Above tonnage	@ 3.01	9,734.34	
Net amount due			$ 3,713.98
Average price paid for coal on Boston delivery Dec. 1901, and Jan. 1902,		$4.48	

Contract price with C. & O. for Boston delivery			3.01	
Providence				
½ yr. tonnage due	108,500 tons			
Add ½ shortage	10,329 tons			
Total	118,829 tons			
½ yrs. shipm'ts	107,970 tons			
Bal. due	10,839 tons	@$4.05	$43,897.95	
Above tonnage		@ 2.81	30,457.59	
Net amount due				13,440.36
Average price paid for coal on Providence delivery Dec. 1901, and Jan. 1902, $4.05				
Contract price with C. & O. for Providence delivery			2.81	
N.Hav.				
½ yr. tonnage due	54,000 tons			
Add ½ shortage	5,328 tons			
Total	59,328 tons			
½ yrs. shipm'ts	53,859 tons			
Bal. due	5,470 tons	@$3.84	$21,004.80	
Above tonnage		@ 2.75	15,042.50	
Net amount due				$5,962.30
				$23,116.64
Average price paid for coal on New Hav. delivery Dec. 1901, and Jan. 1902, $3.84				

Contract price with C. & O. for New Haven delivery		2.75	
Tonnage due on or before July 1, 1902, ½ yr.	215,657 tons		
Shipments during same period			
Boston	29,718 tons		
Providence	90,601 tons		
New Haven	54,915 tons		
Total		175,234 tons	
Shortage last ½ yr. to July 1, 1902		40,423 tons	
Boston.			
½ yrs. tonnage due	37,500 tons		
½ yrs. shipments	29,718 tons		
Balance due	7,782 tons	@ $5.00	$ 38,910.00
Above tonnage		@ 3.01	23,423.82
Net amount due,			$15,486.18
Average price paid for coal on Boston delivery, June, 1902,		$5.00	
Contract price with C. & O. for Boston delivery,		3.01	
Providence.			
½ yrs. tonnage due	108,500 tons		
Add ½ shortage,	10,329 tons		
Total,	118,829 tons		
½ yrs. shipments,	90,601 tons		
Balance due,	28,228 tons	@ $4.85,	136,905.80
Above tonnage,		@ 2.81,	79,320.68
Net amount due,			$57,585.12

Average price paid for coal on Providence delivery June, 1902,		$4.85		
Contract price with C. & O. for Prov. delivery,		2.81		
New Haven.				
½ yrs. tonnage due	54,000 tons			
Add ½ shortage	5,328 tons			
Total,	59,328 tons			
½ yrs. shipments,	54,915 tons			
Balance due,	4,413 tons	@ $4.50,	19,858.50	
Above tonnage,		@ 2.75,	12,135.75	
Net amount due,			$7,722.75	
				$80,794.05
Average price paid for coal on New Haven delivery June, 1902,		$4.50		
Contract price with C. & O. for New Haven delivery,		$2.75		
Grand total,				$103,910.69

Credited to

Correct.

Approved,

Examined and registered,

S. C. FLEETWOOD,
Auditor of Disbursements.

Approved:

H. M. KOCHERSPERGER,
Comptroller.

Received, New Haven, Conn. 190 , one hundred and three thousand nine hundred and ten and 69-100 dollars in full of above account.

THE NEW YORK, NEW HAVEN & HARTFORD RAILROAD,

———, Cashier.

EXHIBIT B., C. & O.

C. & O. Coal & Coke Company,

C. J. Wittenberg, President, New York.

To Chesapeake and Ohio Railway Company, Dr.

Remit to C. E. Potts, Treasurer, Richmond, Va.

1903. Audit Dep't. Bill No.——

June 6. To freight on coal to Newport News, Va. for account of N. Y., N. H. & H. R. R. . $25,727.94

MONTH OF MAY, 1903.

Date	Cargo	Vessel	Cars	Tons	Rate	Freight
1	NH 1	Schr. Jno. Twohy	36	1562	$1.45	$2,264.90
1	1	" " "	1	33	1.35	44.55
7	2	Barge Gwennie	62	2063	1.45	2,991.35
11	3	" Solitaire	57	2154	"	3,131.64
11	3	" "	5	190	1.35	264.86
14	3	Schr. W. Macomber	40	1552	1.45	2,277.30
14	4	" " "	1	48	1.35	64.80
14	5	Barge M.L. Phillips	28	1111	1.45	1,610.95
14	5	" " "	2	87	1.35	117.45
23	6	New Jersey	68	2269	1.45	3,294.05
23	6	" "	1	25	1.35	35.75
25	7	Florida	58	2007	1.45	2,918.37
25	7	"	2	64	1.35	86.40
29	8	White Band	62	2730	1.45	3,971.91
29	9	Jest Point	46	1813	"	2,653.66
	Total,		469	17708		$25,727.94

EXHIBIT "C," C. & O.

C. & O. Coal & Coke Company,
C. J. Wittenberg, President, New York.

To Chesapeake and Ohio Railway Company, Dr.

Remit to C. E. Potts, Treasurer, Richmond, Va.

1903. Audit. Dept., Bill No——

July 2 To freight on coal consigned N. Y., N. H. & H. Railroad.
Month of June, 1903.

Date.	Cargo.	Tons.	Amount
June 2d, 1903.	10	3990	$5,781 00
" 5th "	11	1545	2,258 97
" 8th "	12	2059	2,797 35
" 23d "	13	1684	2,441 96
" " "	14	2155	2,909 25
" 26th "	15	2719	3,926 55
" "	16	2055	2,982 05
Total,		16207	$23,097 13

CIRCUIT COURT OF THE UNITED STATES,

WESTERN DISTRICT OF VIRGINIA.

Between The Interstate Commerce Commission, Petitioner,
and
The Chesapeake & Ohio Railway Company and The New York, New Haven & Hartford Railroad Company, Defendants.

} On Petition, &c
} Answer

The separate answer of the New York, New Haven & Hartford Railroad Company to the petition of the Interstate Commerce Commission.

The New York, New Haven & Hartford Railroad Company, one of the above named defendants, answering separately and for itself the petition of the Interstate Commerce Commission, respectfully answers and says:

That the defendant denies that it now is or ever has been a shipper of coal over the lines of the Chesapeake & Ohio Railway Company, and it denies that, in so far as this defendant is concerned, the Chesapeake & Ohio Railway Company is committing any discrimination of rates between this defendant and any other person or persons with respect to the transportation of coal or other freight over its lines.

This defendant, further answering, says that it requires and uses in connection with its own business of operating railroad lines in New England a large amount of coal annually which it is necessary to procure by contract and purchase, and it has long been the custom of this defendant to enter into contracts covering a period of several years whereby it secured at a uniform rate a supply of coal to be delivered on the line of its own railroads at different points in New England; that on or about the 3d day of December, 1896, this defendant entered into a written contract with the Chesapeake & Ohio Railway Company, a substantial copy of which is annexed to the petition in this cause,

to which for greater certainty this defendant begs leave to refer; that by said contract the Chesapeake & Ohio Railway Company agreed to sell and deliver to this defendant 2,000,000 gross tons of bituminous coal in such quantities monthly as wanted by this defendant from July 1, 1897, to July 1, 1902, deliveries not to exceed 400,000 tons per annum; that it was provided by said contract that the Chesapeake & Ohio Railway Company would deliver said coal to this defendant in its bins at such ports upon its line as required by the monthly requisitions of the purchasing agent of this defendant; that the price to be paid by this defendant for said coal delivered as aforesaid during the whole period of five years was $2.75 per gross ton; this defendant having no knowledge whatever of the price that the Chesapeake & Ohio Railway Company expected to pay for the coal at the mines, the tariff rates at that time existing from the mines to Newport News, the cost of handling at Newport News, or the water freights from Newport News to various New England points, which latter item of course varies from day to day,—this defendant having no knowledge of any of these items, but having knowledge only of the contract delivery price of $2.75 per gross ton, which was the only item in which this defendant was interested.

And this defendant further answering says, that the Chesapeake & Ohio Railway Company entered upon the performance of said contract and for several years annually made deliveries to this defendant of the quantities of coal called for by said contract, rendered its bills for the same at the contract price, and was in due course paid for the same by this defendant.

That during the winter of 1900-1901 the Chesapeake & Ohio Railway Company by reason of strikes and other disturbing causes failed to make delivery of the full quantity of coal due under the contract for that year, and by reason of such failure this defendant was compelled to and did supply itself with large quantities of coal from other sources to make up said deficiency, and was compelled to and did pay for the same a greater price than that fixed by said contract, whereby a just and legal claim

for damage and reimbursement arose in favor of this defendant against the Chesapeake & Ohio Railway Company to the amount of $160,000, which claim was settled and compromised by the acceptance of $130,000, which sum the Chesapeake & Ohio Railway Company paid this defendant in liquidation of said damages.

That early in the year 1902 a general strike of coal miners paralyzed the coal industry, greatly restricted the supply of coal, enhanced enormously its price, and rendered it impossible for the Chesapeake & Ohio Railway Company to fully deliver the 400,000 tons of coal required to complete said contract for the last year of its term; that on the 1st of July, 1902, when the whole of said deliveries should have been made, the Chesapeake & Ohio Railway Company was short in its delivery 59,966 tons; that many times during the year 1902 and prior to July 1st in said year, this defendant demanded from the Chesapeake & Ohio Railway Company that it should perform its contract and deliver to this defendant the number of tons of coal due under said contract, but the Chesapeake & Ohio Railway Company pleading its inability to obtain said coal for such delivery, failed to supply and deliver the same within the period of its contract, and as from time to time requested by this defendant; so that it became necessary for this defendant, in order to obtain a supply of coal for the use of its engines and other purposes, to go into the open market and buy other coal in lieu of the 59,966 tons which it had contracted for and which the Chesapeake & Ohio Railway Company ought to have delivered to it for its use; and in so doing this defendant was required to pay for the coal so obtained from outside parties a sum largely in excess of the price it would have been required to pay to the Chesapeake & Ohio Railway Company for said coal if delivered under the contract aforesaid, the amount of such excess being $103,910.69, which amount represented the pecuniary loss and damage sustained by this defendant by reason of the failure of the Chesapeake & Ohio Railway Company to deliver to it the full amount of coal due upon the last year of said contract.

And this defendant further answering says that this defendant, as it had a right to do, made claim and demand against the Chesapeake & Ohio Railway Company for a reimbursement of said sum of $103,910.69, and insisted and required that the same should be made good to it. That the Chesapeake & Ohio Railway Company not denying its legal obligation under said contract and admitting its liability to make good the loss sustained as aforesaid by this defendant by reason of the failure of the Chesapeake & Ohio Railway Company to perform said contract, nevertheless, on account of the hardship of the case and the fact that its non-performance of said contract was not due to its own fault, but to a condition of affairs over which it had no control, suggested to this defendant that instead of paying the amount of said bill for excess, it would, although the period for performance had expired, still carry out the said contract and supply to this defendant the deficiency of 59,966 tons of coal, and this defendant recognizing also the hardship of the case and the unusual circumstances that had brought about the failure of the Chesapeake & Ohio Railway Company to perform its contract in full, did consent to accept and receive from it, in lieu of the payment of said sum of damages, the delivery of the 59,966 tons of coal still in arrears under said contract, and thereupon an adjustment and arrangement were orally made between this defendant and said vendor, and the Chesapeake & Ohio Railway Company immediately entered upon the performance thereof, and at the time of the filing of the complaint in this matter before the Interstate Commerce Commission, had delivered to this defendant 33,915 tons, leaving 26,051 tons of the amount of said deficiency still to be delivered.

And this defendant further answering says that the arrangement last made was not a new and independent contract, but was in fact a virtual extension of the time of the performance of the original contract and should be construed and adjudicated as such.

And this defendant further answering says, that except upon information, it has no knowledge of the price at which said coal

is procured at the mines by the Chesapeake & Ohio Railway Company, nor has it, except upon similar information, any knowledge as to the cost of handling the same or the rates paid by the Chesapeake & Ohio Railway Company for the transportation of said coal from Newport News to New England; and as matter of fact this defendant is not concerned in any degree as to whether the Chesapeake & Ohio Railway Company is furnishing said coal at a loss or at a gain.

And this defendant further answering says, that the Chesapeake & Ohio Railway Company has always held itself out as legally authorized to sell and contract for the sale and delivery of coal, and the fact that it had made such sales and deliveries of coal to various parties, including this defendant, is and has been well known for many years and the existence of the contract between it and this defendant was not in any wise hidden or concealed.

And this defendant further answering says that the Chesapeake & Ohio Railway Company is authorized by the laws of the State of Virginia, from which it obtains its charter privileges, to contract for and sell coal; that the contract in this case was made in the State of New York and the place of performance was in the States of Connecticut, Rhode Island and Massachusetts.

And this defendant further answering says that the only person entitled to raise the defence of ultra vires as against the performance of the said contract is the Chesapeake & Ohio Railway Company, and inasmuch as that Company has not raised such question but concedes that it had lawful power to make and carry out said contract, neither the Interstate Commerce Commission, nor any other person or authority whatever has power to intervene and raise such question as against this defendant; that while it may be true that if the Chesapeake & Ohio Railway Company was engaged in business not authorized by its charter, the State of Virginia, through its Attorney General, might take proceedings either to restrain it from such violations of its charter or to terminate its existence, yet that such right

does not exist on behalf of the Federal Government or any agency thereof, nor is it vested in the Interstate Commerce Commission.

And this defendant further answering, on information and belief, denies that the Chesapeake & Ohio Railway Company is transporting said coal at rates below its published tariff rates. That, as matter of law and proper legal construction, the Chesapeake & Ohio Railway Company is simply engaged in transporting its own property, and the provisions of the Interstate Commerce act relative to discriminations and tariff rates have no application to the carriage by one railroad company of its own property. That as matter of fact at the time the said contract was entered into and during the first three years of its performance, the sale and delivery of said coal was very profitable to the Chesapeake & Ohio Railway Company, and taking into account its cost at the mine, the cost of handling, and ocean freight and the cost of transportation, it yielded to the vendor, the Chesapeake & Ohio Railway Company, an amount largely in excess of any sum required to make up the full tariff of freight rates for the transportation of said coal over the lines of the Chesapeake & Ohio Railway Company provided said coal had been carried for an outside party.

And this defendant further answering says that it was at the option of the Chesapeake & Ohio Railway Company and is still at its option, to procure said coal to be delivered to this defendant by any other shipper or any other coal dealer in the open market and to pay therefor whatever the same may cost, and this defendant has a right under any and all circumstances to require the full performance of the said contract and the delivery of said coal or the payment of the legal damages for its non-performance. That it is erroneous and misleading to assume that, because in the delivery of the deficiency of tonnage under said contract the Chesapeake & Ohio Railway Company is at the present time losing money, it is engaged in discriminating in freight rates against other shippers, the fact being that the said Company is merely performing a contract of sale which it made

and had a right to make, and in the course of such performance is using in part its own lines of railway to transport its own property.

And this defendant further answering denies that it receives any rebate or advantage of any kind for transportation of coal over the lines of the Chesapeake & Ohio Railway Company; it denies that it is shipping or has ever shipped any coal over said line, or that it is concerned in any way in the cost of such transportation or in the rates charged for the same; and it denies that it ever has had or now has any purpose or design to transgress, evade, or in any way nullify the provisions of the Interstate Commerce law that provide for uniform rates of transportation.

And this defendant further answering submits to the Court that the facts, matters and things contained in the petition in this cause are insufficient to justify the interference of this Honorable Court in the premises and that the said petition fails to state any sufficient cause of action against this defendant.

Wherefore this defendant prays that the said petition be dismissed.

DANIEL & HARPER,

Solicitors of defendant New York, New Haven & Hartford Railroad Company.

JOHN W. GRIGGS,

Of Counsel.

Interstate Commerce Commission
v.
Chesapeake & Ohio Railway Company and New York, New Haven & Hartford Railroad Company.

In Equity.
In the Circuit Court of the United States for the Western District of Virginia.

Agreement of counsel representing both complainant and defendants.

I. The copy of the affidavit made by Wm. C. Bullitt, the original of which is on file in the proceeding in this matter be-

fore the Interstate Commerce Commission, which is filed with the bill in this case may be read in evidence for the complainant, and have the same effect as if the matter therein contained appeared by deposition formally taken.

II. The copy of the proceedings before the Interstate Commerce Commission in this matter and the testimony of Geo. W. Stevens before Commissioner Clements, which is filed with complainant's bill, may be read in evidence for the complainant and shall be considered by the Court.

III. The line of road of the Chesapeake & Ohio Railway Company, over which the coal delivered to the New York, New Haven & Hartford Railroad Company was carried, runs through the Western District of Virginia and said coal was carried from a point or points in West Virginia to Newport News in Virginia.

IV. Chesapeake & Ohio Railway Company to file statements showing amount of coal shipped monthly to the N. Y., N. H. & H. R. R. Co. from July 1, 1897 to time of filing petition in this case.

V. Chesapeake & Ohio Railway Company to file statements of prices paid monthly to operators for this coal from July 1, 1897 to time of filing petition in this case.

VI. Chesapeake & Ohio Railway Company to file statements showing average ocean rates paid monthly on coal delivered to the N. Y., H. H. & H. R. R. Co. from July 1, 1897, to time of filing petition in this case.

The plaintiff by counsel to have the right, if so desired, to inspect the original records from which these statements are made up and verify the same.

VII. Chesapeake & Ohio Railway Co. to file statements showing its tariff rates filed with the Interstate Commerce Commission for the period from July 1, 1897, to July 1, 1902, from the New River District in West Virginia to Newport News in Virginia, on coal similar to that delivered to the N. Y., N. H. & H. R. R. Co., showing particularly what period each rate respectively covers.

a. The Chesapeake & Ohio Railway Company and the N. Y., N. H. & H. R. R. Company agree that from July 1, 1897, to July 1,.1902, and from April 1, 1903, to the date of filing the petition in this case, the C. & O. Railway Company charged and collected its full tariff rates on coal other than that shipped to the N. Y., N. H. & H. R. R. Co. from the New River and Kanawha Districts to Newport News for shipment beyond the capes.

This stipulation shall not be taken as an admission that the C. & O. did not receive full rates on the coal shipped to the N. Y., N. H. & H. R. R. Company.

VIII. The defendants may present their case by affidavits which shall have the same effect as if affiants' depositions had been formally taken in this proceeding.

IX. Complainant to have the right, in case it so desires, to present counter affidavits or cross-examine affiants whose affidavits are filed for the defendants, and the defendants may cross-examine the witnesses for the complainant.

X. Defendants admit that the charter of the C. & O. Railway Company does not and did not, in expressed terms, permit it to buy and sell articles of transportation; yet, the defendants claim that the Statutes of Virginia, in expressed terms, permitted the Railway Company to foster business along its lines in various ways, copies of which said Statutes are to be filed herewith by the defendants.

XI. The N. Y., N. H. & H. R. R. Co. agrees to file in record a copy of the contract between it and the C. & O. Railway Company of December 3, 1896, together with the endorsement of guarantee thereon of J. P. Morgan.

XII. The complainant may file in the record copy of the Act of Assembly of the State of West Virginia, known as Chapter 16, Acts of 1895, the title of which is "An Act to Prevent Railroads from Buying and Selling Coal or Coke, and to Prevent Discrimination."

The above is agreed to as a part of the record to be considered by the Court in the above cause.

CHESAPEAKE & OHIO RAILWAY COMPANY,
By Harrison & Long, Attorneys.

NEW YORK, NEW HAVEN & HARTFORD R. R. Co.,
By Daniel & Harper, Per R. H.

INTERSTATE COMMERCE COMMISSION,
By Wm. A. Glasgow, Jr.
Special Attorney U. S.

October 23, 1903.

COPY.

Contract made between the Chesapeake & Ohio Railway Co. and the New York, New Haven & Hartford Railroad Company.

Said Chesapeake & Ohio Railway Company, for the consideration hereinafter mentioned, hereby agrees to furnish to said railroad company not to exceed two million gross tons of bituminous coal from its line in such quantities monthly as wanted from July 1st, 1897, to July 1st 1902, without charge for demurrage. Deliveries to be made not exceeding four hundred thousand tons per annum.

And said Chesapeake & Ohio Railway Company further agrees that all said bituminous coal shall be of the best quality first cl[illegible] in every respect, and satisfactory to said Railroad Comp[illegible] and said Railway Company has the right to terminate this contract at any time if said bituminous coal be of poor quality, or if its delivery be unnessarily delayed.

And said Chesapeake & Ohio Railway Company further agrees to deliver all said bituminous coal to said Railroad Company in its bins at such ports upon its lines as required by the monthly requisitions of its Purchasing Agent.

In consideration of the faithful performance by the said

Chesapeake & Ohio R'y. Co. of all its agreements herein contained, said Railroad Company agrees to pay for said bituminous coal at the rate of two and seventy-five one hundredths dollars per gross ton New Haven basis, settlement to be made *monthly*.

Said Railway Company has the right to cancel any and all portions of said quantity of bituminous coal remaining undelivered on July 1st, 1902.

Witness the names of the parties hereto this the 3rd day of December, 1896.

(Signed) CHESAPEAKE & OHIO R'Y. CO.
By M. E. Ingalls, President.
(Signed) THE NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY.
By C. S. Mellen, Second Vice Prest.

For value received, I hereby guarantee that the Chesapeake & Ohio R'y. Co. shall not fail to deliver coal on account of strikes.

(Signed) J. PIERPONT MORGAN.

Copy
Richmond, Va., Dec. 10th, 1896.

Interstate Commerce Commission
v.
Chesapeake & Ohio Railway Company, and New York, New Haven & Hartford Railroad Company.
} United States Circuit Court, Lynchburg, Va.

I certify that the annexed contract dated December 11, 1896, between J. W. Hopkins of the first part, and the Greenwood Coal and Coke Company, the Laurel Creek Coal and Coke Company, and J. L. Beury of the second part, is a copy of the original of said contract referred to in the answer of the C. & O. Railway

Company to the petition of the Interstate Commerce Commission in the above styled cause, under which the coal called for by the contract between the C. & O. Railway Company and the N. Y., N. H. & H. R. R. Company was to be furnished by the New River operators.

The said contract was duly lodged with me, and has since been in my custody, and will be produced if desired.

C. E. WELLFORD.
Secretary C. & O. Ry. Co.

November 6, 1903.

Chesapeake & Ohio Railway Co.
M. E. Ingalls, President.
Cincinnati, Ohio.

December 11, 1896.

The Greenwood Coal & Coke Co.,
The Laurel Coal & Coke Co.,
J. L. Beury, Esq.,
Dear Sirs:

Referring to a contract executed this day by you, as parties of the second part, with J. W. Hopkins, party of the first part, for the sale of Four Hundred Thousand tons of coal per annum, for five years from the first of next June; for valuable consideration the Chesapeake & Ohio Railway Company hereby guarantees the faithful performance of said contract by said Hopkins.

Yours truly,
President.

This Agreement, made and entered into this eleventh day of December, 1896, by and between J. W. Hopkins, party of the first part, The Greenwood Coal & Coke Company and The Laurel Creek Coal & Coke Company, corporations chartered under the laws of the State of West Virginia and doing business in the County of Fayette, West Virginia, and J. L. Beury, parties of the second part,

Witnesseth: The party of the second part hereby agrees to furnish and the party of the first part to take unless prevented by strikes or other causes beyond their control 400,000 tons of run-of-mine steam coal of full commercial quality each and every twelve months commencing June first 1897 and ending July first, 1902. The party of the first part agrees to pay and the party of the second part agrees to accept seventy cents per ton of 2240 pounds free on board cars on the line of the Chesapeake & Ohio Railway Company in full payment therefor. All coal to be delivered over dock to vessels at Newport News each calendar month, to be paid for in cash on or before the twenty-fifth of the month succeeding.

In case of an advance in the price of mining the party of the second part shall give notice of such proposed advance to the party of the first part and if said party of the first part declines to pay such advance it shall be optional with the party of the first part to terminate this contract.

Second party to be furnished by the party of the first part each and every day cars in sufficient numbers to take the full portion daily of the 400,000 tons per year. Coal delivered by the party of the second part to be open to the inspection of such party or parties as may be appointed by the party of the first part and if not found to be standard run-of-mine coal to be subject to rejection. Should either party to this contract make claim of unfair inspection the matter to be left to arbitration.

The deliveries of coal under this contract are for business outside of any present delivery made over the line of the C. & O. road and not obtainable at existing prices.

The existing charge of 75 cents per car made by the Chesapeake & Ohio Railway Company for delivery of cars to their main line is to be abolished on coal delivered under this contract.

In order to develop the mines sufficiently to produce the requisite 400,000 tons per annum required under this contract agreement is made to take, commencing with the execution of this contract, all coal possible and as regularly as may be from

the before mentioned Greenwood and Laurel mines at current prices until entering upon the performance of this contract.

Payments for coal delivered under this contract are to be made to the legally authorized representatives of the Greenwood Coal & Coke Company and The Laurel Creek Coal & Coke Company.

In witness whereof, the parties hereto and to a duplicate hereof have hereunto set their names and caused their corporate seals to be hereunto attached the day and year first above written.

(Signed) J. W. HOPKINS.
THE GREENWOOD COAL & COKE COMPANY, by
(Signed) Joseph Lawton, its President.
THE LAUREL CREEK COAL & COKE COMPANY, by
(Signed) E. T. Robins, its President.
(Signed) J. L. BEURY.

Attest:
(Sgd) J. E.Robins, Secy.
(Sgd) E. G. Riddle, Secy.

Interstate Commerce Commission
v.
Chesapeake & Ohio Railway Company, and New York, New Haven & Hartford Railroad Company.
} United States Circuit Court, Lynchburg, Va.

I certify that the annexed contract dated December 31, 1897, between the Atlantic Transportation Company and the C. & O. Railway Company for the transportation of coal from the port of Newport News to New Haven and other ports therein mentioned, is a copy of the original of said contract referred to in the answer of the C. & O. Railway Company to the petition of the Interstate Commerce Commission in the above styled cause.

The said contract was duly lodged with me, and has since been in my custody, and will be produced if desired.

C. E. WELLFORD,
Secretary C. & O. Ry. Co.

November 6, 1903.

Memorandum of Agreement.

Memorandum of agreement made and entered into this 31st day of December, Eighteen Hundred and Ninety Seven between The Atlantic Transportation Company, a corporation duly organized and existing under the laws of New Jersey, party of the first part, and the Chesapeake and Ohio Railway Company, a corporation duly organized and existing under the laws of Virginia and West Virginia, party of the second part.

Witnesseth that the party of the first part agrees to the carry and transport coal from the port of Newport News to the ports hereinafter mentioned at the prices per ton as scheduled, to-wit:

New York, forty-five cents	(.45)	(on board)
New Haven, fifty cents	(.50)	"
New London, fifty cents	(.50)	"
Providence, fifty cents	(.50)	"
Fall River, fifty cents	(.50)	"
New Bedford Coal Pockets, fifty cents	(.50)	"
All other ports (shoal water) sixty cents	(.60)	"
Northeast of Cape Cod, sixty cents	(.60)	"

bridge allowance to be two cents (.02) per ton for each and every bridge.

The said party of the first part further agrees to furnish four (4) new barges at once and at all times provide such vessels sufficient and of suitable tonnage as may be satisfactory to the party of the second part and as it may require for the proper conduct and dispatch of the coal transportation provided for in this agreement from the port of Newport News; said party of the first part further agrees not to transport any coal from Hampton Roads except such as may be received from the party of the second part at Newport News during the continuance of this contract and that the facilities offered by it for the transportation provided for in this agreement shall be in all respects first class, prompt and suitable for the business, and acceptable to Marine Underwriters. Said party of the second part shall give best service possible for the expedition of said work.

The said party of the first part further agrees to pay to the said party of the second part out of the rate hereinbefore mentioned, two and one half cents (.02½) per gross ton of 2,240 pounds upon all coal loaded in what are known as "self trimming barges" or vessels, and five cents (.05) per gross ton upon all coal loaded in barges and vessels not known as "self trimming;" it is further agreed that the party of the second part shall, subject to the conditions hereinafter written, deliver to the party of the first part for transportation an amount not less than One Million (1,000,000) gross tons of coal per year with the option to it, the said party of the second part, to increase said delivery to an amount not exceeding Two Million Five Hundred Thousand (2,500,000) gross tons of coal per year, it being understood and agreed however that in the event of strikes in the mines or on the railroad, or other causes beyond the control of the said party of the second part, causing stoppage or partial stoppage of coal delivery, whether at the mines or at Newport News, then and in that event this contract shall at the option of the said party of the second part be suspended or partially suspended or held in abeyance as the case may be during the existence of such conditions, by immediate notice to that effect given in writing to the party of the first part.

It is further agreed that at any time the said party of the first part shall not at once and immediately transport and convey to the destination as above, said coal as delivered or deliverable by the said party of the second part to it, the said party of the second part shall at its option have the privilege of going into the open market to secure suitable barges and vessels at obtainable rates, and that the difference between the contract rates as hereinbefore set out and the rates so paid, shall be paid by the said party of the first part to the said party of the second part and the said party of the first part hereby stipulates, agrees and binds itself to promptly pay such difference.

It is further stipulated and agreed that this contract shall take effect on the first day of April, Eighteen Hundred and Ninety Eight and continue in full force and effect for Two

Years thereafter, with the privilege and option however on the part of the party of the second part to extend the same for the further period of Three Years after the expiration of the Two Years, provided said option is exercised by notice in writing from the party of the second part to the said party of the first part at any time within Sixty Days before the expiration of the said period of Two Years above mentioned.

It is further agreed by and between the parties hereto that in case of any difference or dispute arising under this contract, each party hereto shall submit the same to arbitration in the following manner, viz: each party hereto shall select a disinterested arbitrator and the two thus selected shall choose a disinterested and competent umpire and their decision or that of a majority of them, shall be final and conclusive between the parties hereto, and the party desiring such arbitration shall give written notice of the same to the other party, stating therein definitely the point or points in dispute and the name of the person selected by such party as arbitrator, and it shall be the duty of the other party hereto, within Fifteen Days after receiving such notice to name an arbitrator on its part and notify the other party to this agreement of its choice. The arbitrators thus chosen shall with convenient speed select an umpire as aforesaid, and the board of arbitration thus chosen by the parties hereto shall give to each of the parties hereto written notice of the time and place of hearing, which shall not be less than Ten nor more than Twenty Days thereafter, and at the time and place appointed shall proceed with the hearing, unless for some good cause, of which the board of arbitration or a maority of it, shall be the judge, shall be postponed until some later day within a reasonable time. The award and determination of the said board shall be reduced to writing and a copy thereof delivered to each of the parties hereto and shall be final and conclusive upon the parties in reference to the question or questions thus submitted.

In witness whereof the parties hereto have caused these presents to be signed by their respective Presidents and their corpo-

rative seals to be hereto affixed and attested by their respective Secretaries, the day and year first above written.

THE ATLANTIC TRANSPORTATION COMPANY, by
(Signed) Edw. P. Meany, President.

Attest:

(Signed) Lawrence S. Mott, Secretary.

CHESAPEAKE AND OHIO RAILWAY COMPANY, by
(Signed) M. E. Ingalls, President.

Attest:

(Signed) C. E. Wellford, Secretary.

CHESAPEAKE AND OHIO RAILWAY COMPANY

Statement of Coal Delivered to New York, New Haven & Hartford R. R. Co., with Cost Thereof, Including Charges for Delivery Under Contract Effective 1st July, 1897.

DATE		Total No. Cargoes	WEIGHT		CONTRACT PRICE PAID		COST OF COAL		VESSEL FRT. AND LIGHTERAGE		DISCHARGING		INSURANCE	
Month	Year		Tons	Lbs.	Amount	Average Rate	Amount	Average Rate	Amount	Average Rate	Amount	Average Rate	Amount	Average Rate
July	1897	17	28,890	1140	82,186 11	2.845	20,223 35	.700	18,828 28	.651	6,552 10	.226	248 55	.008
Aug.	"	14	21,619	2110	61,030 78	2.823	15,133 96	.700	13,786 03	.637	4,834 72	.223	184 02	.008
Sept.	"	18	27,629	870	78,755 41	2.850	19,340 55	.700	18,417 17	.666	6,149 78	.222	240 12	.008
Oct.	"	20	30,129	780	85,672 47	2.843	21,090 55	.700	19,801 03	.657	6,748 54	.224	258 57	.008
Nov.	"	19	29,122	1980	82,751 34	2.841	20,386 02	.700	19,190 57	.658	6,445 35	.221	422 07	.014
Dec.	"	21	33,095	1270	93,527 63	2.826	23,166 86	.700	22,350 49	.675	7,550 79	.228	478 05	.014
Jan.	1898	24	39,177	660	111,502 83	2.846	27,424 09	.700	27,408 10	.699	8,855 46	.226	568 11	.014
Feb.	"	26	45,098	1310	126,552 28	2.806	31,568 95	.700	29,961 72	.664	10,366 70	.229	641 01	.014
Mar.	"	25	37,704	190	107,776 87	2.858	26,392 85	.700	26,639 53	.709	8,235 80	.218	550 83	.014
April	"	18	30,125	1760	84,793 56	2.815	21,087 85	.700	18,647 59	.619	6,825 85	.226	252 62	.008
May	"	18	30,128	880	85,081 01	2.824	21,089 85	.700	19,557 91	.649	6,869 94	.228	254 66	.008
June	"	26	40,176	370	113,794 04	2.832	28,123 70	.700	26,132 59	.650	8,986 49	.223	347 38	.008
July	"	13	20,989	1540	59,996 54	2.858	14,692 78	.700	11,784 20	.561	4,641 43	.221	179 36	.008
Aug.	"	10	21,769	180	61,857 95	2.841	15,238 35	.700	11,965 96	.549	4,800 39	.220	188 78	.008
Sept.	"	14	21,551	710	61,886 69	2.871	15,085 94	.700	12,541 58	.582	4,724 42	.219	188 88	.008
Oct.	"	28	47,642	1430	134,319 96	2.819	33,349 82	.700	24,867 19	.522	11,031 63	.231	400 86	.008
Nov.	"	18	27,693	2020	78,820 79	2.846	19,385 78	.700	15,323 45	.553	6,081 81	.219	403 92	.014
Dec.	"	17	23,973	700	67,710 92	2.824	16,781 33	.700	22,361 29	.932	5,385 26	.224	373 12	.015
Jan.	1899	21	28,321	2180	80,274 90	2.834	20,149 49	.711	30,070 29	1.061	6,275 73	.221	418 60	.014
Feb.	"	8	10,414	2180	29,767 60	2.858	7,370 32	.707	12,884 21	1.237	2,211 60	.212	155 99	.014
Mar.	"	20	28,337	1290	81,116 07	2.866	20,345 68	.718	29,381 44	1.036	6,370 18	.324	426 96	.014
April	"	32	52,353	120	149,059 46	2.846	36,597 94	.699	51,373 43	.981	11,796 85	.213	458 23	.008
May	"	20	33,037	160	94,425 93	2.858	23,091 09	.699	26,045 38	.788	7,476 23	.226	289 05	.008
June	"	18	33,644	810	94,612 09	2.812	23,478 70	.697	23,681 71	.703	7,474 52	.222	285 07	.008
July	"	31	51,827	920	145,983 21	2.817	36,123 50	.697	40,448 13	.780	11,496 35	.221	439 87	.008
Aug.	"	13	23,794	150	67,180 93	2.823	16,635 50	.700	18,458 80	.775	5,532 22	.232	200 58	.008
Sept.	"	12	17,600	1460	50,414 82	2.857	12,349 80	.700	14,620 45	.831	4,072 85	.231	155 57	.008
Oct.	"	13	22,406	390	63,415 65	2.826	15,600 75	.700	20,974 94	.936	4,936 82	.220	306 55	.014
Nov.	"	17	27,025	22	76,665 00	2.836	18,899 20	.699	36,566 14	1.353	5,924 87	.219	515 02	.019
Dec.	"	19	31,272	950	88,288 41	2.823	21,771 38	.696	42,777 93	1.368	6,839 61	.218	550 32	.017
Jan.	1900	17	23,859	220	67,647 19	2.853	16,610 30	.696	33,875 82	1.420	4,988 94	.210	473 59	.019
Feb.	"	11	19,709	200	55,282 94	2.805	13,710 20	.695	26,565 02	1.348	4,284 07	.217	265 29	.013
Mar.	"	9	13,240	410	37,671 01	2.844	9,255 70	.699	18,731 88	1.414	2,947 25	.222	252 27	.019
April	"	13	18,438	1080	52,358 23	2.850	17,044 05	.924	22,549 59	1.223	4,074 75	.221	241 59	.013
May	"	16	34,129	1280	96,070 09	2.815	31,611 40	.926	27,144 98	.795	7,489 41	.219	311 80	.009
June	"	15	30,208	964	86,167 71	2.852	27,910 95	.924	22,075 58	.730	6,790 77	.224	371 69	.012
July	"	12	24,109	1890	67,996 44	2.822	22,321 17	.928	16,740 89	.694	5,383 90	.223	312 64	.013
Aug.	"	14	26,200	1560	73,723 29	2.814	24,175 81	.923	17,164 75	.655	5,766 93	.221	286 78	.011
Sept.	"	17	36,176	2190	102,509 03	2.834	33,442 44	.924	29,552 10	.785	8,291 41	.229	333 42	.009
Oct.	"	24	46,906	690	133,499 16	2.845	43,305 71	.923	36,109 12	.769	10,343 40	.225	566 17	.012
Nov.	"	15	32,820	1580	93,299 28	2.843	30,398 26	.926	22,873 65	.697	7,445 39	.227	641 50	.019
Dec.	"	12	26,023	1330	72,951 76	2.803	24,049 08	.924	17,218 95	.662	5,887 65	.226	450 93	.017
Jan.	1901	15	33,716	1750	95,763 80	2.840	31,085 53	.922	25,027 05	.742	7,264 11	.216	572 57	.017
Feb.	"	22	43,912	1240	123,334 06	2.809	40,486 32	.922	29,751 54	.677	9,669 50	.222	807 91	.018
Mar.	"	24	48,215	340	136,939 95	2.840	44,570 49	.924	34,117 98	.708	10,919 14	.226	819 27	.017
April	"	12	24,512	100	68,806 66	2.807	23,247 45	.948	16,202 83	.661	5,718 33	.233	294 38	.012
May	"	21	43,472	650	123,706 23	2.846	41,235 70	.949	32,014 34	.737	9,598 93	.221	530 82	.012
June	"	20	41,494	1260	116,732 47	2.813	39,380 96	.949	28,051 72	.676	9,426 16	.227	466 84	.011
July	"	16	32,392	1460	91,515 03	2.825	30,732 50	.949	25,007 88	.772	7,400 84	.229	375 41	.011
Aug.	"	21	36,254	960	102,725 37	2.833	34,400 45	.949	28,093 67	.775	8,409 29	.232	485 44	.013
Sept.	"	17	32,424	100	92,112 92	2.841	30,766 70	.949	25,414 38	.784	7,280 12	.225	406 52	.013
Oct.	"	20	40,808	460	115,197 52	2.823	38,759 05	.949	31,545 79	.773	9,060 27	.222	535 64	.013
Nov.	"	17	36,276	1050	102,332 19	2.821	34,485 00	.950	28,144 60	.776	8,267 20	.228	767 03	.021
Dec.	"	8	15,025	1940	42,024 90	2.797	14,287 05	.950	11,538 89	.768	3,289 19	.218	316 88	.021
Jan.	1902	17	34,870	1610	98,627 52	2.828	33,145 50	.950	29,283 30	.839	7,713 98	.221	723 22	.021
Feb.	"	12	26,997	260	76,281 29	2.826	25,629 10	.950	21,521 84	.796	6,302 42	.233	523 21	.019
Mar.	"	14	31,140	1800	87,775 59	2.818	29,582 05	.950	24,833 70	.797	6,919 13	.222	649 39	.021
April	"	15	35,615	2150	101,322 39	2.845	33,812 40	.950	29,729 77	.834	7,974 78	.224	478 92	.013
May	"	15	39,500	1655	111,206 05	2.815	37,507 90	.950	31,650 40	.801	8,755 41	.221	712 46	.018
June	"	3	7,150	1930	19,959 45	2.791	6 804 85	.950	5,533 09	.773	1,369 99	.191	65 37	.009
May	1903	9	17,627	2160	49,455 04	2.805	22,563 79	1.280	16,429 60	.932	4,107 66	.233	176 28	.010
June	"	7	16,141	1870	45,224 63	2.801	20,661 48	1.280	14,042 01	.870	3,722 17	.231	161 43	.010
July	"	2	4,309		12,108 29	2.810	5,515 52	1.280	3,878 10	.900	1,077 25	.250	74 35	.017
		1,052	1,890,235	1471	$5,351,548 73	$2.831	$1,554,461 79	$ .822	$1,489,262 34	$ .787	$423,434 03	$ .224	$24,833 73	$ .013

Delivery called for under above contract, 2,000,000 Tons

Tonnage moved by C. & O. Ry. under above contract, 1,890,235

Tonnage short for which adjustment was made by C. & O. Ry. under above contract, *88,056

Total Tonnage delivered under above contract, 1,978,291

Tonnage short under above contract, 21,709 "

*March, 1899,	982
Sept., "	1,165
Oct., "	1,208
Apr., 1900,	1,650
Dec., "	83,051

I hereby certify that the foregoing statement is correct,

L. F. SULLIVAN,
Comptroller.

Richmond, Va., 6th Nov., 1903.

Rates on Tidewater Bit. Coal beyond Capes
January 1st, 1897, to date

Date	New River	Kanawha	Guyandotte	Kentucky	Tariff Auth.	Headed to
April 10, 1895	225	250	7967		5177	N. Y.
Jan. 2, 1899	200	225	ICC 829		7967	"
" 3, 1899	see below	200	" 845		7994	"
Mar. 8, 1899	90	115	" 911		8155	News
May 13, 1899	80	105	" 1003		8407	"
Jan. 17, 1900	85	110	" 1324		9179	"
Feb. 1, 1900	100	125	" 1334		9231	"
	R.O. M. Splint		" 1347			
" " "		110	Cancelled by	9647	9322	"
April 2, 1900	115	130	ICC 1428		9647	"
May 15, 1900	115	125	" 1454		9699	"
Apr. 1, 1901	125	135	" 1726		10332	"
			Guyan.			
Oct. 21, 1902	125	135	145	ICC 2200	10850	"
				Ky.		
Jan. 12, 1903	125	135	145	" 2286	155 10932	"
April 1, 1903	135	145	155	" 2374	165 11032	"

Quinnimont
to
Hawks Nest 175
South Side Branch Headed through to New York
Loop Creek, Laurel Creek,
Kerney Creek and Hawks Nest, 180

Copy

Chesapeake … way Company.

… ent.

Exchange List
For Joint Tariff 5177.
C. C. McClain
and
Others.

RICHMOND, VA., April 10, 1895.

THROUG… T TARIFF,

Rates of Tra… ct April 15, 1895,

Via Rail to Newp… via Ocean and Vessels,

BITUMINOUS COAL,

Where in Car Loads—Minimum Weight 12 Tons—from Mines to Newport News, Va., and in Cargo Quantities, by Ocean and Vessel from Newport News to Destination, SUBJECT TO OCEAN CONTRACTS AND CHARTERS, AS ARRANGED AND ACCEPTED IN ADVANCE OF SHIPMENTS.

FROM NEW RIVER DISTRICT.

Quinnimont	W. Va.	Red Ash	W. Va.	Macdonald	W. Va.	Keeney's Creek	W. Va.	Nuttall	W. Va
Prince	"	Brooklyn	"	Echo	"	Boone	"	Fayette	"
Alaska	"	Cunard	"	Central	"	Ballanger	"	Elmo	"
Claremont	"	Harvey	"	Fire Creek	"	Masters	"	Sunnyside	"
Beechwood	"	Red Star	"	East Sewell	"	Dubree	"	Gaymont	"
Stone Cliff	"	Glen Jean	"	Sewell	"	Cavendish	"	Hawk's Nest	"
Thurmond	"	Dun Loup	"	Caperton	"	Lookout	"	Ansted	"
Rush Run	"	Turkey Knob	"						

To New York, N. Y., $2.25 per Ton 2,240 Pounds.

FROM KANAWHA DISTRICT.

Gauley	W. Va.	Crescent	W. Va.	Paint Creek	W. Va.	Ronda	W. Va.	Burdette	W. Va
Deep Water	"	Montgomery	"	Gordon's	"	Acme	"	Nicholas Road	"
Mt. Carbon	"	Union Coal Co.	"	Crown Hill	"	Peerless	"	Belva	"
Powellton Junc.	"	Con. Mining Co.	"	Belmont Coal Co.	"	Cabin Creek	"	Vaughan	"
Forrest Hill	"	Maudley	"	Blacksburg	"	Winifrede Junc.	"	Morris	"
Eagle	"	Chesapeake	"	East Bank	"	Spring Hill	"	Greendale	"
Edgewater	"	Kanawha C.C.Co.	"	Coalburg	"				

To New York, N. Y., $2.50 per Ton 2,240 Pounds.

MANIFEST SOLID THROUGH VIA NEWPORT NEWS, VA.

Above rates do not include Marine Insurance.

W. P. WALKER, Jr.,
Freight Traffic Manager.

E. D. HOTCHKISS,
General Freight Agent.

500—9—4—'95.

…THREE COPIES OF THIS TARIFF, TWO OF WHICH MUST BE POSTED IN TWO CONSPICUOUS PLACES FOR PUBLIC INSPECTION.

AUTHORITY No. 1187.

Chesapeake & Ohio Railway Company.

Traffic Department.

RICHMOND, VA., April 10, 1895.

THROUGH FREIGHT TARIFF,

No. 5177,

Rates of Transportation, taking effect April 15, 1895,

Via Rail to Newport News, Va., thence via Ocean and Vessels,

—— ON ——

BITUMINOUS COAL,

Where in Car Loads—Minimum Weight 12 Tons—from Mines to Newport News, Va., and in Cargo Quantities, by Ocean and Vessel from Newport News to Destination, SUBJECT TO OCEAN CONTRACTS AND CHARTERS, AS ARRANGED AND ACCEPTED IN ADVANCE OF SHIPMENTS.

FROM NEW RIVER DISTRICT.

Quinnimont	W. Va.	Red Ash	W. Va.	Macdonald	W. Va.	Keeney's Creek	W. Va.	Nuttall	W. Va.
Prince	"	Brooklyn	"	Echo	"	Boone	"	Fayette	"
Alaska	"	Cunard	"	Central	"	Ballanger	"	Elmo	"
Claremont	"	Harvey	"	Fire Creek	"	Masters	"	Sunnyside	"
Beechwood	"	Red Star	"	East Sewell	"	Dubree	"	Gaymont	"
Stone Cliff	"	Glen Jean	"	Sewell	"	Cavendish	"	Hawk's Nest	"
Thurmond	"	Dun Loup	"	Caperton	"	Lookout	"	Ansted	"
Rush Run	"	Turkey Knob	"						

To New York, N. Y., $2.25 per Ton 2,240 Pounds.

FROM KANAWHA DISTRICT.

Gauley	W. Va.	Crescent	W. Va.	Paint Creek	W. Va.	Ronda	W. Va.	Burdette	W. Va.
Deep Water	"	Montgomery	"	Gordon's	"	Acme	"	Nicholas Road	"
Mt. Carbon	"	Union Coal Co.	"	Crown Hill	"	Peerless	"	Belva	"
Powellton Junc.	"	Con. Mining Co.	"	Belmont Coal Co.	"	Cabin Creek	"	Vaughan	"
Forrest Hill	"	Handley	"	Blacksburg	"	Winifrede Junc.	"	Morris	"
Eagle	"	Chesapeake	"	East Bank	"	Spring Hill	"	Greendale	"
Edgewater	"	Kanawha C.C.Co.	"	Coalburg	"				

To New York, N. Y., $2.50 per Ton 2,240 Pounds.

MANIFEST SOLID THROUGH VIA NEWPORT NEWS, VA.

Above rates do not include Marine Insurance.

W. P. WALKER, Jr.,
Freight Traffic Manager.

E. D. HOTCHKISS,
General Freight Agent.

500—9—4—'95.

THREE COPIES OF THIS TARIFF, TWO OF WHICH MUST BE POSTED IN TWO CONSPICUOUS PLACES FOR PUBLIC INSPECTION.

TO BE POSTED IN TWO CONSPICUOUS PLACES AT EACH FREIGHT-SHIPPING STATION

AUTHORITY No. 1187. CHANGE: REDUCTION.	Chesapeake and Ohio Railway. JOINT FREIGHT TARIFF No. 7967. Superseding No. 5177.	I. C. C. No. 829.

JOINT FREIGHT TARIFF

OF THE

CHESAPEAKE AND OHIO RAILWAY COMPANY

ON

BITUMINOUS COAL,

I. C. C. RECEIPT No. 3003

C. & O. ADVICE No. 134

In Car Loads—Minimum Weight 12 Tons—from Mines to Newport News, Va., and in Cargo Quantities, by Vessel from Newport News to Destination, SUBJECT TO OCEAN CONTRACTS AND CHARTERS, AS ARRANGED AND ACCEPTED IN ADVANCE OF SHIPMENT.

FROM NEW RIVER DISTRICT.

MAIN LINE.		MAIN LINE—Con.		Loup Creek Branch. (Intersecting at Thurmond, W. Va.)		South Side Branch. (Intersecting at Thurmond, W. Va.)		Keeney's Creek Branch. (Intersecting at Nuttall, W. Va.)	
Quinnimont,	W. Va	Beury,	W. Va	So. Thurmond,	W. Va	Thurmond Mine,	W. Va	Boone,	W. Va
Prince,	"	Central,	"	Harvey,	"	Rush Run Mine,	"	Ballanger,	"
McKendree,	"	Fire Creek,	"	Red Star,	"	Red Ash Mine,	"	Masters,	"
Slater's,	"	East Sewell,	"	Glen Jean,	"	Brooklyn Mine,	"	Dubree,	"
Buffalo,	"	Sewell,	"	Collinsville,	"	Canard Mine,	"	Cavendish,	"
Alaska,	"	Caperton,	"	Dun Loup,	"	Brown Mine,	"	Lookout,	"
Claremont,	"	Kenney's Creek,	"	Turkey Knob,	"				
Beechwood,	"	Nuttall,	"	Macdonald,	"				
Stone Cliff,	"	Fayette,	"						
Riverview,	"	Elmo,	"						
Thurmond,	"	Sunnyside,	"						
Dimmock,	"	Caymont,	"						
Rush Run,	"	Hawk's Nest,	"						

Hawk's Nest Branch. (Intersecting at Hawk's Nest, Va.)	
Ansted,	W. Va

TO NEW YORK, N. Y., $2.00 PER TON 2240 POUNDS.

FROM KANAWHA DISTRICT.

MAIN LINE.		Main Line—Con.		Main Line—Con.		Main Line—Con.		Cabin Creek Branch. (Intersecting at Coalburg, W. Va.)		GAULEY BRANCH. Intersecting at Gauley, W. Va.)	
Gauley,	W. Va	Forrest Hill,	W. Va	Consolidated,	W. Va	Black Cat,	W. Va	Dry Branch,	W. Va	K. & M. Jct.,	W. Va
Kanawha Falls,	"	St. Clair,	"	Handley,	"	East Bank,	"	Ronda,	"	Burdette,	"
Deep Water,	"	Eagle,	"	Dego,	"	Coalburg,	"	Fairfield,	"	Nicholas Road,	"
Digby,	"	Edgewater,	"	Paint Creek,	"	Winifrede Junction,	"	Cane Fork,	"	Belva,	"
Mt. Carbon,	"	Crescent,	"	Gordon's	"	Brownstown,	"	Alum Lick,	"	Vaughan,	"
Powellton,	"	Montgomery,	"	Crown Hill,	"	Spring Hill,	"	Leewood,	"	Morris,	"
Diamond,	"	Union,	"	Belmont,	"			Acme,	"	Greendale,	"

TO NEW YORK, N. Y., $2.25 PER TON 2240 POUNDS.

Via Rail to Newport News, Va., thence via Ocean and Vessels.

MANIFEST SOLID THROUGH VIA NEWPORT NEWS, VA.

Above rates do not include Marine Insurance.

Issued Cincinnati, O., December 27, 1898. **Effective January 2, 1899.**

G. W. BENJAMIN,
General Coal Freight Agent, C. & O. Ry.,
Cincinnati, O.

Issued by
JNO. F. ORNDORFF,
Ass't General Freight Agent, C. & O. Ry.,
Cincinnati, O.

300

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TO BE POSTED IN TWO CONSPICUOUS PLACES AT EACH FREIGHT-SHIPPING STATION

AUTHORITY No. 1187.
CHANGE:
REDUCTION.

Chesapeake and Ohio Railway.
JOINT FREIGHT TARIFF No. 7994.
Superseding No. 7967.

I. C. C. No. 845.
Superseding No. 836

JOINT FREIGHT TARIFF
OF THE
CHESAPEAKE AND OHIO RAILWAY COMPANY
ON
BITUMINOUS COAL,
CAR LOADS, Minimum Weight 20 Tons,
TO NEW YORK, N. Y.

From Mines to Newport News, Va., and [illegible] Facilities, by Vessel from Newport News to Destination,
SUBJECT TO [illegible] RIGHTS AND CHARTERAS.

FROM [illegible] DISTRICT.

MAIN LINE.

Quinnimont,	W.Va
Prince,	"
McKendree,	"
Hinton,	"
Talcott,	"
Alta,	"
Thurmond,	"
Hawksnest,	"
Stone Cliff,	"
Riverview,	"
Thurmond,	"
Dunmore,	"
Rush Run,	"

MAIN LINE—Con.

Beury,	W.Va
Central,	"
Fire Creek,	"
East Sewell,	"
Sewell,	"
Cuperton,	"
Kenney's Creek,	"
Nuttall,	"
Fayette,	"
Kimo,	"
Sunnyside,	"
Caymont,	"
Hawk's Nest,	"

[illegible] Branch.

[illegible] Thurmond,	W.Va
Thurmond,	W.Va
[illegible]	W.Va
[illegible]	"
[illegible]	"
[illegible]	"
[illegible]	"

Loop Creek Branch
(Intersecting at Thurmond, W. Va.)

So. Thurmond,	W.Va
Harvey,	"
Red Star,	"
Glen Jean,	"
Collinsville,	"
Van Loup,	"
Turkey Knob,	"
Macdonald,	"
Sugar Creek,	"

Keeney's Creek Branch
(Intersecting at Nuttall, W. Va.)

Boone,	W.Va
Belanger,	"
Masters,	"
Dubree,	"
Cavendish,	"
Lookout,	"

Laurel Creek Branch

Greenwood,	W.Va
Laurel,	"
Big Q,	"

Hawk's Nest Branch
(Intersecting at Hawk's Nest, Va.)

Antrel,	W.Va

$1.75 PER TON 2240 POUNDS.

$1.60 PER TON 2240 POUNDS.

Subject to increase or reduction in accordance with prevalent rates under ocean contracts and charterers arranged and accepted in advance of shipment; shipper to have option to make his own ocean contract or charter, in which event the rail proportion of the cost of such through transportation shall be 60 percent of the above named rates of $1.75 and $1.60 to New York.

FROM KANAWHA DISTRICT.

MAIN LINE.

Dunbar,	W.Va
Kanawha Falls,	"
Deep Water,	"
Eskdale,	"
Mt. Carbon,	"
Powellton,	"
Diamond,	"

Main Line—Con.

Forest Hill,	W.Va
Big Otter,	"
Eagle,	"
Hopkins,	"
Cresent,	"
Montgomery,	"
Deen,	"

Main Line—Con.

Consolidated,	W.Va
Handley,	"
Dego,	"
Paint Creek,	"
Gordon's,	"
Crown Hill,	"
Belmont,	"

Main Line—Con.

Black Oak,	W.Va
East Bank,	"
Coalburg,	"
Winifred Junction,	"
Peytonstown,	"
Spring Hill,	"

Ohio Creek Branch.
(Intersecting at Coalburg, W. Va.)

Dry Branch,	W.Va
Reedy,	"
Fairfield,	"
Cane Fork,	"
Alum Lick,	"
Leewood,	"
Acme,	"

GAULEY BRANCH.
Intersecting at Gauley, W. Va.)

K. & M. Jct.,	W.Va
Burdette,	"
Nicholas Road,	"
Belva,	"
Vaughan,	"
Morris,	"
Grandale,	"

TO NEW YORK, N. Y., $2.00 PER TON 2240 POUNDS.

Subject to increase or reduction in accordance with prevalent rates under ocean contracts and charterers arranged and accepted in advance of shipment; shipper to have option to make his own ocean contract or charter, in which event the rail proportion of the cost of such through transportation shall be 60 percent of the above named rate of $2.00 to New York.

MANIFEST SOLID THROUGH VIA NEWPORT NEWS, VA.

Above rates do not include Marine Insurance.

Issued Cincinnati, O., December 29, 1898. Effective January 3, 1899.

G. W. BENJAMIN,
General Coal Freight Agent, C. & O. Ry.
Cincinnati, O.

JNO. F. ORNSBY,
Asst. General Freight Agent, C. & O. Ry.
Cincinnati, O.

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...CONSPICUOUS PLACES AT EACH FREIGHT-SHIPPING STATION.

Authority No.1187	CHESAPEAKE AND OHIO RY.	I.C.C.No.911
Reduction	FREIGHT TARIFF NO.8155	Superseding
	Superseding No.7994	No.845

FREIGHT TARIFF

OF THE

CHESAPEAKE AND OHIO RAILWAY COMPANY.

-:ON:-

BITUMINOUS COAL, CAR LOADS

Minimum weight 20 tons

TO

NEWPORT NEWS VA.

When destined beyond the Capes.

FROM

New River District 90 cents per ton 2240 pounds.

Kanawha District $ 1.15 per ton 2240 pounds.

3/3/99

Issued Cincinnati O. March 3,1899. Effective March 5,1899.

Under this Tariff, when freight is to be loaded by consignor or unloaded by consignee, one dollar ($1.00) per car per day, or fraction thereof, for delay beyond 48 hours in loading or unloading will be added to the rates named herein, and constitue a part of the total charges to be collected by the carrier on the property; except, however, when in conflict with Car Service Association or local regulations at shipping point or destination, in which case such Car Service Association or local regulations shall prevail.

G. W. BENJAMIN,
General Coal Freight Agent C. & O. R'y,
Cincinnati, O.

Issued by
JNO. F. ORNDORFF,
Ass't General Freight Agent C. & O. R'y,
Cincinnati, O.

The traffic Officers of the above-named Companies will certify to the Interstate Commerce Commission their concurrence in the rates herein given.

[over.]

LIST OF COAL AND COKE SHIPPING STATIONS ON CHESAPEAKE AND OHIO RY.

NEW RIVER DISTRICT.

Main Line.

Quinnimont,	W. Va.
Prince,	"
McKendree,	"
Slater's,	"
Buffalo,	"
Alaska,	"
Claremont,	"
Beechwood,	"
Stone Cliff,	"
Riverview,	"
Thurmond,	"
Dimmock,	"
Rush Run,	"
Beury,	"
Central,	"
Fire Creek,	"
East Sewell,	"
Sewell,	"
Caperton,	"
Keeney's Creek,	"
Nuttall,	"
Fayette,	"
Elmo,	"
Sunnyside,	"
Grymont,	"
Hawk's Nest,	"

Loup Creek Branch.

(Intersecting at Thurmond, W. Va.)

So. Thurmond,	W. Va.
Harvey,	"
Red Star,	"
Glen Jean,	"
Collinsville,	"
Dun Loup,	"
Turkey Knob,	"
Macdonald,	"

South Side Branch.

(Intersecting at Thurmond, W. Va.)

Thurmond Mine,	W. Va.
Rush Run Mine,	"
Red Ash Mine,	"
Brooklyn Mine,	"
Cunard Mine,	"
Brown Mine,	"

Keeney's Creek Branch.

(Intersecting at Nuttall, W. Va.)

Boone,	W. Va.
Ballanger,	"
Masters,	"
Dubree,	"
Cavendish,	"
Lookout,	"

Hawk's Nest Branch.

(Intersecting at Hawk's Nest, Va.)

Ansted,	W. Va.

KANAWHA DISTRICT.

Main Line.

Gauley,	W. Va.
Kanawha Falls,	"
Deep Water,	"
Digby,	"
Mt. Carbon,	"
Powellton,	"
Diamond,	"
Forrest Hill,	"
St. Clair,	"
Eagle,	"
Edgewater,	"
Crescent,	"

Main Line.

Montgomery,	W. Va.
Union,	"
Consolidated,	"
Handley,	"
Dego,	"
Paint Creek,	"
Gordon's,	"
Crown Hill,	"
Belmont,	"
Black Cat,	"
East Bank,	"
Coalburg,	"
Winifrede Junction,	"
Spring Hill,	"

Deep Water Branch.

(Intersecting at Deep Water, W. Va.)

Robson,	W. Va.

Cabin Creek Branch.

(Intersecting at Coalburg, W. Va.)

Dry Branch,	W. Va.
Ronda,	"
Fairfield,	"
Cane Fork,	"
Alum Lick,	"
Leewood,	"
Acme,	"

†Gauley Branch.

(Intersecting at Gauley, W. Va.)

K. & M. Junction,	W. Va.
Burdette,	"
Nicholas Road,	"
Belva,	"
Vaughan,	"
Morris,	"
Greendale,	"

BIG SANDY DIVISION.

Hatfield,	Ky.
Savage Branch,	"
Lockwood,	"
Burgess,	"
Wright's,	"
Buchanan,	"
Zelda,	"
Curnutt's,	"
Catalpa,	"

Fuller's,	Ky.
Potter's,	"
Whitt's,	"
Louisa,	"
Eloise,	"
Camp Ground,	"
Walbridge,	"
Tunnel Siding,	"
Torchlight,	"

Chapman,	Ky.
Gallup,	"
Kise,	"
George's Creek,	"
Hygeia Springs,	"
Richardson,	"
Forbes,	"
Peach Orchard	"

†Rates from stations on Gauley Branch will be 10 cents per ton higher than the rates from Kanawha District.

TO BE POSTED IN TWO CONSPICUOUS PLACES AT EACH FREIGHT-SHIPPING STATION.

Authority No.1187
Reduction

CHESAPEAKE AND OHIO RY.
FREIGHT TARIFF NO.3407
Superseding No.3155

I.C.C.No.1003
Superseding
No.911

FREIGHT TARIFF
OF THE
CHESAPEAKE AND OHIO RAILWAY COMPANY.

-:On:-

BITUMINOUS COAL, CAR LOADS

Minimum weight 20 tons.

TO

51899

NEWPORT NEWS VA.

When destined beyond the capes.

FROM

New River District	80 cents	per ton 2240 pounds.
Kanawha District	$ 1.05	per ton 2240 pounds.

Issued Cincinnati, O. May 6, 1899. Effective May 13, 1899.

Under this Tariff, when freight is to be loaded by consignor or unloaded by consignee, one dollar ($1.00) per car per day, or fraction thereof, for delay beyond 48 hours in loading or unloading, will be added to the rates named herein, and constitute a part of the total charges to be collected by the carrier on the property; except, however, when in conflict with Car Service Association or local regulations at shipping point or destination, in which case such Car Service Association or local regulations shall prevail.

G. W. BENJAMIN,
General Coal Freight Agent C. & O. R'y,
Cincinnati, O.

[OVER.]

Issued by
JNO. F. ORNDORFF,
Ass't General Freight Agent C. & O. R'y,
Cincinnati, O.

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LIST OF COAL AND COKE SHIPPING STATIONS ON CHESAPEAKE AND OHIO RY.

NEW RIVER DISTRICT.

Main Line.

Quinnimont,	W. Va.
Prince,	"
McKendree,	"
Slater's,	"
Buffalo,	"
Alaska,	"
Claremont,	"
Beechwood,	"
Stone Cliff,	"
Riverview,	"
Thurmond,	"
Dimmock,	"
Rush Run,	"
Beury,	"
Central,	"
Fire Creek,	"
East Sewell,	"
Sewell,	"
Caperton,	"
Keeney's Creek,	"
Nuttall,	"
Fayette,	"
Elmo,	"
Sunnyside,	"
Gaymont,	"
Hawk's Nest,	"

Loup Creek Branch.

(Intersecting at Thurmond, W. Va.)

So. Thurmond,	W. Va.
Harvey,	"
Red Star,	"
Glen Jean,	"
Collinsville,	"
Dun Loup,	"
Turkey Knob,	"
Macdonald,	"

South Side Branch.

(Intersecting at Thurmond, W. Va.)

Thurmond Mine,	W. Va.
Rush Run Mine,	"
Red Ash Mine,	"
Brooklyn Mine,	"
Cunard Mine,	"
Brown Mine,	"

Keeney's Creek Branch.

(Intersecting at Nuttall, W. Va.)

Boone,	W. Va.
Ballanger,	"
Masters,	"
Dubree,	"
Cavendish,	"
Lookout,	"

Hawk's Nest Branch.

(Intersecting at Hawk's Nest, Va.)

Ansted,	W. Va.

KANAWHA DISTRICT.

Main Line.

Gauley,	W. Va.
Kanawha Falls,	"
Deep Water,	"
Digby,	"
Mt. Carbon,	"
Powellton,	"
Diamond,	"
Forrest Hill,	"
St. Clair,	"
Eagle,	"
Edgewater,	"
Crescent,	"

Main Line.

Montgomery,	W Va.
Union,	"
Consolidated,	"
Handley,	"
Dego,	"
Paint Creek,	"
Gordon's,	"
Crown Hill,	"
Belmont,	"
Black Oat,	"
East Bank,	"
Coalburg,	"
Winifrede Junction	"
Spring Hill,	"

Deep Water Branch.

(Intersecting at Deep Water, W. Va.)

Robson,	W Va.

Cabin Creek Branch.

(Intersecting at Coalburg, W. Va.)

Dry Branch,	W. Va.
Rosida,	"
Fairfield,	"
Cane Fork,	"
Alum Lick,	"
Leewood,	"
Acme,	"

†Gauley Branch.

(Intersecting at Gauley, W. Va.)

K. & M. Junction,	W. Va.
Burdette,	"
Nicholas Road,	"
Belva,	"
Vaughan,	"
Morris,	"
Greendale,	"

BIG SANDY DIVISION.

Hatfield,	Ky.
Savage Branch,	"
Lockwood,	"
Burgess,	"
Wright's,	"
Buchanan,	"
Zelda,	"
Curnutt's,	"
Catalpa,	"
Fuller's,	Ky.
Potter's,	"
Whitt's,	"
Louisa,	"
Eloise,	"
Camp Ground,	"
Walbridge,	"
Tunnel Siding,	"
Torchlight,	"
Chapman,	Ky.
Gallup,	"
Kise,	"
George's Creek,	"
Hygeia Springs,	"
Richardson,	"
Forbes,	"
Peach Orchard,	"

†Rates from stations on Gauley Branch will be 10 cents per ton higher than the rates from Kanawha District.

TO BE POSTED IN TWO CONSPICUOUS PLACES AT EACH FREIGHT-SHIPPING STATION.

Supplement No.1107) CHESAPEAKE AND OHIO RY.)
(FREIGHT TARIFF NO.9179 (
Advance) Superseding No.8407) Supplement No. 1053

FREIGHT TARIFF
OF THE
CHESAPEAKE AND OHIO RAILWAY COMPANY.

-:ON:-

BITUMINOUS COAL, CAR LOADS

Minimum weight 20 tons.

TO

NEWPORT NEWS VA.

When destined beyond the capes.

FROM

New River District	85 cents	per ton 2240 pounds.
Kanawha District	$ 1.10	per ton 2240 pounds.

JAN -8 1900

Issued Cincinnati,O. January 5,1900. Effective January 17,1900.

Under this Tariff, when freight is to be loaded by consignor or unloaded by consignee, one dollar ($1.00) per car per day, or fraction thereof, for delay beyond 48 hours in loading or unloading, will be added to the rates named herein, and constitute a part of the total charges to be collected by the carrier on the property; except, however, when in conflict with Car Service Association or local regulations at shipping point or destination, in which case such Car Service Association or local regulations shall prevail.

G. W. BENJAMIN,
General Coal Freight Agent C. & O. R'y,
Cincinnati, O.

[OVER.]

Issued by
JNO. F. ORNDORFF,
Ass't General Freight Agent C. & O. R'y,
Cincinnati, O.

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LIST OF COAL AND COKE SHIPPING STATIONS ON CHESAPEAKE AND OHIO R.Y.

NEW RIVER DISTRICT.

Main Line.

Quinnimont,	W. Va.
Prince,	"
McKendree,	"
Slater's,	"
Buffalo,	"
Alaska,	"
Claremont,	"
Beechwood,	"
Stone Cliff,	"
Riverview,	"
Thurmond,	"
Dimmock,	"
Rush Run,	"
Fenry,	"
Central,	"
Fire Creek,	"
East Sewell,	"
Sewell,	"
Caperton,	"
Keeney's Creek,	"
Nuttall,	"
Fayette,	"
Elmo,	"
Sunnyside,	"
Gaymont,	"
Hawk's Nest,	"

Loup Creek Branch.

(Intersecting at Thurmond, W. Va.)

do. Thurmond,	W. Va.
Harvey,	"
Red Star,	"
Glen Jean,	"
Collinsville,	"
Dun Loup,	"
Turkey Knob,	"
Macdonald,	"

South Side Branch.

(Intersecting at Thurmond, W. Va.)

Thurmond Mine,	W. Va.
Rush Run Mine,	"
Red Ash Mine,	"
Brooklyn Mine,	"
Cunard Mine,	"
Brown Mine,	"

Keeney's Creek Branch.

(Intersecting at Nuttall, W. Va.)

Boone,	W. Va.
Ballanger,	"
Masters,	"
Dubree,	"
Cavendish,	"
Lookout,	"

Hawk's Nest Branch.

(Intersecting at Hawk's Nest, Va.)

Ansted,	W. Va.

KANAWHA DISTRICT.

Main Line.

Gauley,	W. Va.
Kanawha Falls,	"
Deep Water,	"
Digby,	"
Mt. Carbon,	"
Powellton,	"
Diamond,	"
Forrest Hill,	"
St. Clair,	"
Eagle,	"
Edgewater,	"
Crescent,	"

Main Line.

Montgomery,	W. Va.
Union,	"
Consolidated,	"
Handley,	"
Dego,	"
Paint Creek,	"
Gordon's,	"
Crown Hill,	"
Belmont,	"
Black Oak,	"
East Bank,	"
Coalburg,	"
Winifrede Junction	"
Spring Hill,	"

Deep Water Branch.

(Intersecting at Deep Water, W. Va.)

Robson,	W. Va.

Cabin Creek Branch.

(Intersecting at Coalburg, W. Va.)

Dry Branch,	W. Va.
Monda,	"
Fairfield,	"
Cane Fork,	"
Alum Lick,	"
Leewood,	"
Acme,	"

†Gauley Branch.

(Intersecting at Gauley, W. Va.)

K. & M. Junction,	W. Va.
Burdette,	"
Nicholas Road,	"
Belva,	"
Vaughan,	"
Morris,	"
Greendale,	"

BIG SANDY DIVISION.

Hatfield,	Ky.
Savage Branch,	"
Lockwood,	"
Burgess,	"
Wright's,	"
Buchanan,	"
Zelda,	"
Curnutt's,	"
Catalpa,	"

Fuller's,	Ky.
Foster's,	"
Whitt's,	"
Louisa,	"
Eloise,	"
Camp Ground,	"
Walbridge,	"
Tunnel Siding,	"
Torchlight,	"

Chapman,	Ky.
Greenup,	"
Ross,	"
George's Creek,	"
Hygeia Springs,	"
Richardson,	"
Fortune,	"
Peach Orchard,	"

†Rates from stations on Gauley Branch will be 10 cents per ton higher than the rates from Kanawha District.

TO BE POSTED IN TWO CONSPICUOUS PLACES AT EACH FREIGHT-SHIPPING STATION.

[redacted]ity No.1107) CHESAPEAKE AND OHIO RY.) I.C.C.No.1554
(FREIGHT TARIFF No.9231 (Superseding
Advance) Superseding No.9179) No.1324

FREIGHT TARIFF
OF THE
CHESAPEAKE AND OHIO RAILWAY COMPANY.

-:ON:-

BITUMINOUS COAL, CAR LOADS

Minimum weight 20 tons.

TO

NEWPORT NEWS VA.

When destined beyond the capes.

FROM

JAN 18 1900

New River District	$ 1.00 cents per ton 2240 pounds.
Kanawha District	$ 1.25 "

Issued Cincinnati, O. January 12, 1900. Effective February 1, 1900.

Under this Tariff, when freight is to be loaded by consignor or unloaded by consignee, one dollar ($1.00) per car per day, or fraction thereof, for delay beyond 48 hours in loading or unloading, will be added to the rates named herein, and constitute a part of the total charges to be collected by the carrier on the property; except, however, when in conflict with Car Service Association or local regulations at shipping point or destination, in which case such Car Service Association or local regulations shall prevail.

G. W. BENJAMIN,
General Coal Freight Agent C. & O. R'y,
Cincinnati, O.

[OVER.]

Issued by
JNO. F. ORNDORFF,
Ass't General Freight Agent C. & O. R'y,
Cincinnati, O.

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LIST OF COAL AND COKE SHIPPING STATIONS ON CHESAPEAKE AND OHIO RY.

NEW RIVER DISTRICT.

Main Line.

Quinnimont, W. Va.
Prince, "
McKendree, "
Slaters, "
Buffalo, "
Alaska, "
Claremont, "
Beechwood, "
Stone Cliff, "
Riverview, "
Thurmond, "
Dimmock, "
Rush Run, "
Beury, "
Central, "
Fire Creek, "
East Sewell, "
Sewell, "
Caperton, "
Keeney's Creek, "
Nuttall, "
Fayette, "
Elmo, "
Sunnyside, "
Gaymont, "
Hawk's Nest, "

Loup Creek Branch.

(Intersecting at Thurmond, W. Va.)

So. Thurmond, W. Va.
Harvey, "
Red Star, "
Glen Jean, "
Collinsville, "
Dun Loup, "
Turkey Knob, "
Macdonald, "

South Side Branch.

(Intersecting at Thurmond, W. Va.)

Thurmond Mine, W. Va.
Rush Run Mine, "
Red Ash Mine, "
Brooklyn Mine, "
Quinnard Mine, "
Brown Mine, "

Keeney's Creek Branch.

(Intersecting at Nuttall, W. Va.)

Boone, W. Va.
Ballengee, "
Masters, "
Dubree, "
Cavendish, "
Lookout, "

Hawk's Nest Branch.

(Intersecting at Hawk's Nest, W. Va.)

Ansted, W. Va.

KANAWHA DISTRICT.

Main Line.

Gauley, W. Va.
Kanawha Falls, "
Deep Water, "
Digby, "
Mt. Carbon, "
Powellton, "
Diamond, "
Forrest Hill, "
St. Clair, "
Eagle, "
Edgewater, "
Crescent, "

Main Line.

Montgomery, W. Va.
Union, "
Consolidated, "
Handley, "
Dego, "
Paint Creek, "
Gordons, "
Crown Hill, "
Belmont, "
Black Oak, "
East Bank, "
Coalburg, "
Winifrede Junction "
Spring Hill, "

Kelly Creek Branch.

(Intersecting at Deep Water, W. Va.)

Robbins, W. Va.

Kelly Creek Branch.

(Intersecting at [illegible])

Dry Branch, W. Va.
Rocky, "
Fairdale, "
Cane Rock, "
Alum Lick, "
Leewood, "
Kemp, "

†Gauley Branch.

(Intersecting at Gauley, W. Va.)

K. & M. Junction, W. Va.
Burdette, "
Nicholas Road, "
Belva, "
Vaughan, "
Morris, "
Greendale, "

BIG SANDY DIVISION.

Hatfield, Ky.
Savage Branch, "
Lockwood, "
Burgess, "
Wrights, "
Buchanan, "
Zelda, "
Curnutte, "
Catalpa, "

Fullers, Ky.
Potters, "
Whitt's, "
Louisa, "
Eloise, "
Camp Ground, "
Walbridge, "
Tunnel Siding, "
Torchlight, "

Chapman, Ky.
Gallup, "
Kiser, "
George's Creek, "
Hygeia Springs, "
Richardson, "
Turpen, "
Peach Orchard, "

†Rates from stations on Gauley Branch will be 10 cents per ton higher than the rates from Kanawha District.

TO BE POSTED IN TWO CONSPICUOUS PLACES IN EACH FREIGHT SHIPPING STATION

Authority No.1187	CHESAPEAKE AND OHIO RY	I.C.C.No.1454
Reduction	FREIGHT TARIFF NO.9699	
	Superseding No.9647.	Superseding No.1428

FREIGHT TARIFF

OF THE

CHESAPEAKE AND OHIO RAILWAY COMPANY

-:ON:-

BITUMINOUS COAL - CAR LOADS

Minimum Weight 20 tons

MAILED FROM
TARIFF BUREAU, C. & O. RY.
MAY 8 1900
Mail Clerk.

TO

NEWPORT NEWS VA.

When destined beyond the capes

FROM

New River District	$1.15 cents per ton 2240 pounds.
Kanawha District	$1.25 "

(F.M.W.Telegram May 3, File 70536)

Issued Richmond, Va. May 8, 1900. Effective May 15, 1900.

Under this Tariff, when freight is to be reloaded by consignor or unloaded by consignee, one dollar ($1.00) per car per day, or fraction thereof, for delay beyond 48 hours in loading or unloading, will be added to the rates named herein, and constitute a part of the total charges to be collected by the carrier on the property; except, however, when in conflict with Car Service Association, or local regulations applying policy or demurrage, in which case such Car Service Association or local regulations shall prevail.

F. M. WHITAKER,
Freight Traffic Manager, C. & O. R'y,
Cincinnati, O.

E. D. HOTCHKISS,
General Freight Agent, C. & O. R'y,
Richmond, Va.

Issued by
GEO. F. ORNDORFF,
Asst. General Freight Agent, C. & O. R'y,
Richmond, Va.

(OVER)

LIST OF COAL AND COKE SHIPPING STATIONS ON CHESAPEAKE AND OHIO RY.

NEW RIVER DISTRICT.

Main Line.

Quinnimont,	W. Va.
Prince,	"
McKendree,	"
Slater,	"
Buffalo,	"
Alaska,	"
Claremont,	"
Beechwood,	"
Stone Cliff,	"
Thurmond,	"
Dimmock,	"
Beury,	"
Central,	"
Fire Creek,	"
East Sewell,	"
Sewell,	"
Caperton,	"
Keeney's Creek,	"
Nuttall,	"
Fayette,	"
Masterson,	"
Elmo,	"
Sunnyside,	"
Gaymont,	"
Hawk's Nest,	"

Loup Creek Branch.

(Intersecting at Thurmond, W. Va.)

Harvey,	W. Va.
Red Star,	"
Glen Jean,	"
Sun,	"
Dun Loup,	"
Turkey Knob,	"
Macdonald,	"

South-Side Branch.

(Intersecting at Thurmond, W. Va.)

Arbuckle,	W. Va.
Thurmond Mine,	"
Rush Run Mine,	"
Red Ash Mine,	"
Brooklyn Mine,	"
Cunard Mine,	"
South Caperton,	"
Brown Mine,	"
Kaymoor Mines,	"

Keeney's Creek Branch.

(Intersecting at Nuttall, W. Va.)

Boone,	W. Va.
Ballanger No. 2,	"
Ballanger,	"
Masters,	"
Dubree,	"
Cavendish,	"
Lookout,	"

Hawk's Nest Branch.

(Intersecting at Hawk's Nest, W. Va.)

Ansted,	W. Va.

Cincinnati Division.

Riverton,	Ky.

KANAWHA DISTRICT.

Main Line.

Gauley,	W. Va.
Kanawha Falls,	"
Deep Water,	"
Digby,	"
Mt. Carbon,	"
Diamond,	"
Forrest Hill,	"
St. Clair,	"
Eagle,	"
Edgewater,	"
Crescent,	"
Montgomery,	"
Union,	"
Consolidated,	"
Handley,	"
Chesapeake,	"
Dego,	"

Main Line.

Paint Creek,	W. Va.
Crown Hill,	"
Belmont,	"
Black Cat,	"
East Bank,	"
Coalburg,	"
Cabin Creek,	"
Winifrede Junction,	"
Brownstown,	"
Spring Hill,	"

Deep Water Branch.

(Intersecting at Deep Water, W. Va.)

Robson,	W. Va.

Cabin Creek Branch.

(Intersecting at Coalburg, W. Va.)

Dry Branch,	W. Va.
Ronda,	"
Fairfield,	"
Cane Fork,	"
Alum Lick,	"
Leewood,	"
Acme,	"

Gauley Branch.

(Intersecting at Gauley, W. Va.)

K. & M. Junction,	W. Va.
Nicholas Road,	"
Belva,	"
Vaughan,	"
Greendale,	"

Huntington Division.

Ashland,	Ky.

Lexington Division.

Kilgore,	Ky.
Music,	"
Strait Creek Mines,	"
Mt. Savage,	"
E. K. Junction,	"

BIG SANDY DIVISION.

Hatfield,	Ky.
Savage Branch,	"
Lockwood,	"
Burgess,	"
Wrights,	"
Buchanan,	"
Zelda,	"
Curnutts,	"
Catalpa,	"

Fullers,	Ky.
Potters,	"
Louisa,	"
Eloise,	"
Tunnel Siding,	"
Walbridge,	"
Torchlight,	"
Chapman,	"
Gallup,	"

Kise,	Ky.
George's Creek,	"
Hygeia Springs,	"
Richardson,	"
Forbes,	"
Peach Orchard,	"
White House,	"

(ty No.1167) CHESAPEAKE AND OHIO RY.)
( ) (I.C.C.No.1347
(New Rate) FREIGHT TARIFF NO.9322)

FREIGHT TARIFF
OF THE
CHESAPEAKE AND OHIO RAILWAY COMPANY.

-:OIL:-

RUN OF MINE SPLINT COAL - CAR LOADS

Minimum weight 20 tons,

TO

JAN 27 1900

NEWPORT NEWS VA.

When destined beyond the capes.

FROM

KANAWHA DISTRICT

1.10 per ton 2240 pounds.

Issued Cincinnati,O. January 25,1900. Effective February 2,1900.

Under this Tariff, when freight is to be loaded by consignor or unloaded by consignee, one dollar ($1.00) per car per day, or fraction thereof, for delay beyond 48 hours in loading or unloading, will be added to the rates named herein, and constitute a part of the total charge to be collected by the carrier on the property; except, however, when in conflict with Car Service Association or local regulations at shipping point or destination, in which case Car Service Association or local regulations shall prevail.

G. W. BENJAMIN,
General Coal Freight Agent C. & O. R'y,
Cincinnati, O.

[over.]

Issued by
JNO. F. ORNDORFF,
Asst General Freight Agent C. & O. R'y,
Cincinnati, O.

66

LIST OF COAL AND COKE SHIPPING STATIONS ON CHESAPEAKE AND OHIO [illegible]

NEW RIVER DISTRICT.

Main Line.

Quinnimont, W. Va.
Prince, "
McKendree, "
Slater's, "
Buffalo, "
Alaska, "
Claremont, "
Beechwood, "
Stone Cliff, "
Riverview, "
Thurmond, "
Dimmock, "
Rush Run, "
Beury, "
Central, "
Tire Creek, "
East Sewell, "
Sewell, "
Caperton, "
Keeney's Creek, "
Nuttall, "
Fayette, "
Elmo, "
Sunnyside, "
Gaymont, "
Hawk's Nest, "

Loup Creek Branch.

(Intersecting at Thurmond, W. Va.)

So. Thurmond, W. Va.
Harvey, "
Red Star, "
Glen Jean, "
Collinsville, "
Dun Loup, "
Turkey Knob, "
Macdonald, "

South Side Branch.

(Intersecting at Thurmond, W. Va.)

Thurmond Mine, W. Va.
Rush Run Mine, "
Red Ash Mine, "
Brooklyn Mine, "
Cunard Mine, "
Brown Mine, "

Keeney's Creek Branch.

(Intersecting at Nuttall, W. Va.)

Boone, W. Va.
Ballanger, "
Masters, "
Dubree, "
Cavendish, "
Lookout, "

Hawk's Nest Branch.

(Intersecting at Hawk's Nest, W. Va.)

Amzed, W. Va.

KANAWHA DISTRICT.

Main Line.

Gauley, W. Va.
Kanawha Falls, "
Deep Water, "
Digby, "
Mt. Carbon, "
Powellton, "
Diamond, "
Forrest Hill, "
St. Clair, "
Eagle, "
Edgewater, "
Crescent, "

Main Line.

Montgomery, W. Va.
Union, "
Consolidated, "
Handley, "
Dego, "
Paint Creek, "
Gordon's, "
Crown Hill, "
Belmont, "
Black Gal, "
East Bank, "
Coalburg, "
Winifrede Junction, "
Spring Hill, "

Deep Water Branch.

(Intersecting at Deep Water, W. Va.)

Boiger, W. Va.

Paint Creek Branch.

(Intersecting at Gordon's, W. Va.)

Dry Branch, W. Va.
Kanda, "
Fairdale, "
Oak Hill, "
Alum Lick, "
Lockwood, "
Acme, "

Gauley Branch.

(Intersecting at [illegible])

[illegible] Junction, W. Va.
[illegible] Branch, "
[illegible], "
[illegible], "

BIG SANDY DIVISION.

Hatfield, Ky.
Savage Branch, "
Lockwood, "
Burgess, "
Wright's, "
Buchanan, "
Zelda, "
Current's, "
Catalpa, "

Falk's, Ky.
Potter's, "
White's, "
Louise, "
Eloise, "
Camp Ground, "
Wallridge, "
Tunnel Siding, "
Torchlight, "

Chapman, Ky.
Galling, "
Kite, "
George's Creek, "
Hygeia Springs, "
Richardson, "
Forbes, "
Peach Orchard, "

†Rates from stations on Gauley Branch will be 10 cents per ton higher than the rates from Kanawha District.

TO BE POSTED IN TWO CONSPICUOUS PLACES AT EACH FREIGHT SHIPPING STATION

Authority No.1187	:CHESAPEAKE & OHIO RAILWAY	: I.C.C. No.1726
	: FREIGHT TARIFF NO. I0332	:
(F.M.W. No.81117):	Superseding No.9699	: Superseding No.1454

FREIGHT TARIFF
OF THE CHESAPEAKE AND OHIO RAILWAY COMPANY

-: ON :-

BITUMINOUS COAL, CARLOADS.

Minimum weight 20 tons.

-: TO :-

NEWPORT NEWS, VA.

When destined beyond the Capes.

-: FROM :-

New River Daitrict

$ I.25 per ton of 2240 pounds.

Kanawha District.

$I.35 per ton of 2240 pounds.

Issued Richmond,Va. March 20,1901. Effective April 1, 1901:

Under this Tariff, when freight is to be loaded by consignee or unloaded by consignee, one dollar ($1.00) per car per day, or fraction thereof, for delay beyond 48 hours in loading or unloading, will be added to the rates named herein, and constitute a part of the total charges to be collected by the carrier on the property; except, however, when in conflict with Car Service Association or local regulations at shipping point or destination, in which case such Car Service Association or local regulations shall prevail.

F. M. WHITAKER,
Freight Traffic Manager, C. & O. R'y,
Richmond, Va.

E. D. HOTCHKISS,
General Freight Agent, C. & O. R'y,
Richmond, Va.

Issued by
JNO. F. ORNDORFF,
Ass't General Freight Agent, C. & O. R'y,
Richmond, Va.

Agent's Tariff No. 1187	Chesapeake and Ohio Railway	
	FREIGHT TARIFF NO. I0850	I C C No. 3200
	Superseding No. I0332	Superseding No. 1726
Tom Tate		

FREIGHT TARIFF

OF THE

CHESAPEAKE AND OHIO RAILWAY COMPANY

ON

BITUMINOUS COAL, CARLOADS

Minimum weight 15 Tons

TO

Newport News, Va.

When destined beyond the Capes

RATES

[illegible] $1.25 per ton 2240 pounds

[illegible] $1.35 per ton 2240 pounds

[illegible] $1.40 per ton 2240 pounds

[illegible] Effective Oct. 21st, 1902

Under this Tariff, when freight is to be loaded by consignee or unloaded by consignee, one dollar ($1.00) per car per day, or fraction thereof, for delay beyond 24 hours in loading or unloading, will be added to the rates named herein, and constitute a part of the total charges to be collected by the carrier on the property; except, however, when in conflict with Car Service Association or local regulations at shipping point or destination, in which case such Car Service Association or local regulations shall prevail.

Issued by

F. M. WHITAKER,
Freight Traffic Manager, C. & O. R'y,
Richmond, Va.

E. D. HOTCHKISS,
General Freight Agent, C. & O. R'y,
Richmond, Va.

[illegible] CONDORFF,
Asst. General Freight Agent, C. & O. R'y,
Richmond, Va.

(OVER.)

LIST OF COAL AND COKE SHIPPING STATIONS ON THE CHESAPEAKE AND OHIO RAILWAY.

NEW RIVER DISTRICT.

Huntington Division.

Quinnimont ..... W Va
Prince ..... "
McKendree ..... "
*Thayer ..... "
*Alaska ..... "
*Beechwood ..... "
Stone Cliff ..... "
Thurmond ..... "
*Big Bend ..... "
*Beury ..... "
*Central ..... "
Fire Creek ..... "
*East Sewell ..... "
Sewell ..... "
Caperton ..... "
*Keeneys Creek ..... "
Nuttall ..... "
Fayette ..... "
*Newlyn ..... "
*Masterson ..... "
*Elmo ..... "
*Sunnyside ..... "
*Gaymont ..... "
Hawks Nest ..... "

Laurel Creek Branch.

Via Quinnimont, W. Va.

*Quinnimont Mines ..... W Va
*Robbins ..... "
*Laurel Creek ..... "
*Big "Q" ..... "
*Greenwood ..... "

Piney Creek Branch.

Via Prince, W. Va.

*Royal ..... W Va
*Pack ..... "
*Gaston ..... "
*White Stick ..... "
*Wheeley ..... "
Raleigh ..... "

Loup Creek Branch.

Via Thurmond, W. Va.

So. Thurmond ..... W Va
*Sutphin ..... "
*Bissell ..... "
*Red Star ..... "
Glen Jean ..... "
*White Oak Jct. ..... "
*Sun ..... "
*Collinsville ..... "
*Derryhale ..... "
*Dun Loup ..... "
*Turkey Knob ..... "
Macdonald ..... "

White Oak Branch.

Via Thurmond and White Oak Jct., W. Va.

*Scarbro ..... W Va
*Carlisle ..... "

South Side Branch.

Via Thurmond, W. Va.

*Rend ..... W Va
*Thurmond Mine ..... "
*Rush Run Mine ..... "
*Red Ash ..... "
*Brooklyn ..... "
*Cunard ..... "
*South Caperton ..... "
*Brown ..... "
*Kaymoor ..... "

Keeneys Cr. Branch.

Via Nuttall, W. Va.

*Boone ..... W Va
*Ballanger ..... "
*Masters ..... "
*Dubree ..... "
*Cavendish ..... "
*Lookout ..... "

Hawks Nest Branch.

Via Hawks Nest, W. Va.

Ansted ..... W Va

KANAWHA DISTRICT.

Huntington Division.

Gauley ..... W Va
Kanawha Falls ..... "
Deep Water ..... "
*Digby ..... "
Mt. Carbon ..... "
*Diamond ..... "
*Forest Hill ..... "
*St. Clair ..... "
Eagle ..... "
*Edgewater ..... "
*Crescent ..... "
Montgomery ..... "
*Union ..... "
*Consolidated ..... "
Handley ..... "

Huntington Div.—Con.

*Chesapeake ..... W Va
*Pratt ..... "
Paint Creek ..... "
*Crown Hill ..... "
*Belmont ..... "
*Black Oak ..... "
East Bank ..... "
Coalburg ..... "
*Ohelyan ..... "
Winifrede Jct. ..... "
Marmet ..... "
*Carkin ..... "
Malden ..... "
*Black Band ..... "
Spring Hill ..... "

Gauley Branch.

Via Gauley, W. Va.

*K. & M. Jct. ..... W Va
Belva ..... "
*Bell Creek ..... "
*Vaughan ..... "
*Greendale ..... "

Deep Water Branch.

Via Deep Water, W. Va.

*Robeson ..... W Va

Paint Creek Branch.

Via Pratt, W. Va.

*Scales ..... W Va
*Mucklow ..... "
*Four Mile ..... "

Cabin Creek Branch.

Via Coalburg, W. Va.

*Dry Branch ..... W Va
*Ronda ..... "
*Fairfield ..... "
*Coal Fork ..... "
*Cane Fork ..... "
*Altum Lick ..... "
*Leewood ..... "
Acme ..... "
*Empire ..... "

GUYANDOT DISTRICT.

Huntington Division.

St. Albans ..... W Va
*Lewis ..... "
Scary ..... "
Scott ..... "
Teays ..... "
Hurricane ..... "

Huntington Div.—Con.

*Kibler ..... W Va
Culloden ..... "
*Walton ..... "
Milton ..... "
Ona ..... "
Barboursville ..... "

Guyandot Valley Branch.

Via Barboursville, W. Va.

*Elmwood ..... W Va
*Ines ..... "
*Roach ..... "
*Salt Rock ..... "

Guyandot Val. Br.—Con.

*West Hamlin ..... W Va
*Sheridan ..... "
*Hadley ..... "
Midkiff ..... "

KENTUCKY DISTRICT.

Huntington Division.

Catlettsburg ..... Ky
*Chaffee ..... "
*Normal ..... "
*Clyffeside ..... "
*Hermann ..... "
*Norton ..... "

Huntington Div.—Con.

Ashland ..... Ky
*Ashland Junc. ..... "
*Bellefonte ..... "
*Amanda ..... "

Kentucky Division.

Russell ..... Ky
*Wurtland ..... "
Riverton ..... "
Peach Orchard ..... "
*Richardson ..... "
*Torchlight ..... "
Louisa ..... "

Kentucky Div—Con.

White House ..... Ky
*Hammond ..... "
*Strait Creek Mines ..... "
*Mt. Savage ..... "
E. K. Junction ..... "
*Corey ..... "

*No Agent.

Authority No. 1187 Reissue and	Chesapeake and Ohio Railway FREIGHT TARIFF NO. I0932 Superseding No I0850	I C C No 2286 Superseding No 220

FREIGHT TARIFF

OF THE

CHESAPEAKE & OHIO RAILWAY COMPANY

On

BITUMINOUS COAL, CAR LOADS

Freight charges to be assessed on basis of actual weight as ascertained by track scales at regular coal weighing points, subject to a minimum of 15 tons per car.

To

Newport News, Va.

When destined beyond the Capes

From

New River District	$1.25 per ton 2240 pounds
Kanawha District	$1.35 per ton 2240 pounds
Guyandotte District	$1.45 per ton 2240 pounds
Kentucky District	$1.55 per ton 2240 pounds

See Circular No. 1540, I C C No. 2255 for grouping of coal districts

Expires March 31st, 1903

Issued Richmond, Va. Jan. 12th, 1903 Effective Jan. 12th, 1903

Under this Tariff, when freight is to be loaded by consignor or unloaded by consignee, one dollar ($1.00) per car per day, or fraction thereof, for delay beyond 48 hours in loading or unloading, will be added to the rates named herein, and constitute a part of the total charges to be collected by the carrier on the property; except, however, when in conflict with Car Service Association or local regulations at shipping point or destination, in which case such Car Service Association or local regulations shall prevail.

F. M. WHITAKER,
Freight Traffic Manager, C. & O. R'y,
RICHMOND, VA.

Issued by
[illegible]
A. G. F. A., Richmond, Va.

Issued by
E. D. HOTCHKISS,
General Freight Agent, C. & O. R'y,
RICHMOND, VA.

L. H. JONES & SON PRINT, RICHMOND, VA.

[OVER.]

LIST OF COAL AND COKE SHIPPING STATIONS ON THE CHESAPEAKE AND OHIO RAILWAY.

NEW RIVER DISTRICT.

Huntington Division.

Quinnimont ..... W Va
Prince ..... "
McKendree ..... "
*Thayer ..... "
*Alaska ..... "
*Beechwood ..... "
Stone Cliff ..... "
Thurmond ..... "
*Big Bend ..... "
*Beury ..... "
*Central ..... "
Fire Creek ..... "
*East Sewell ..... "
Sewell ..... "
Caperton ..... "
*Keeneys Creek ..... "
Nuttall ..... "

Huntington Div.—Con.

Fayette ..... W Va
*Newlyn ..... "
*Michigan ..... "
*Elmo ..... "
*Sunnyside ..... "
*Garmont ..... "
Hawks Nest ..... "

Piney Creek Branch,
Via Prince, W. Va.

*Royal ..... W Va
*Gaston ..... "
*Stonewall ..... "
*Stansford ..... "
*Whorley ..... "
Raleigh ..... "

Loup Creek Branch,
Via Thurmond, W. Va.

*So. Thurmond ..... W Va
*Sutphin ..... "
*Bissell ..... "
*Prudence ..... "
*Red Star ..... "
Glen Jean ..... "
*White Oak Jct. ..... "
*Sun ..... "
*Collingville ..... "
*Derryhale ..... "
*Dun Loup ..... "
*Turkey Knob ..... "
Macdonald ..... "

White Oak Branch,
Via Thurmond and White Oak Jct., W. Va.

*Scarbro ..... W Va
*Carlisle ..... "

South Side Branch,
Via Thurmond, W. Va.

*Bend ..... W Va
*Thurmond Mine ..... "
*Rush Run Mine ..... "
*Red Ash ..... "
*Brooklyn ..... "
*Cunard ..... "
*South Caperton ..... "
*Brown ..... "
*Raymoor ..... "

Keeneys Cr. Branch,
Via Nuttall, W. Va.

*Boone ..... W Va
*Ballenger ..... "
*Masters ..... "
*Dubree ..... "
*Cavendish ..... "
*Lookout ..... "

Hawks Nest Branch,
Via Hawks Nest, W. Va.

Ansted ..... W Va

KANAWHA DISTRICT.

Huntington Division.

Gauley ..... W Va
Kanawha Falls ..... "
Deep Water ..... "
*Rigby ..... "
Mt. Carbon ..... "
*Diamond ..... "
*Forest Hill ..... "
*St. Clair ..... "
Eagle ..... "
*Edgewater ..... "
*Crescent ..... "
Montgomery ..... "
*Consolidated ..... "
Handley ..... "
*Chesapeake ..... "

Huntington Div.—Con.

Pratt ..... W Va
Paint Creek ..... "
Crown Hill ..... "
*Belmont ..... "
*Black Oak ..... "
East Bank ..... "
Coalburg ..... "
Cabin ..... "
Winifrede Jct. ..... "
Marmet ..... "
*Cabin Creek ..... "
Marden ..... "
*Black Band ..... "
Dana ..... "

Gauley Branch,
Via Gauley, W. Va.

*E. & M. Jct. ..... W Va
Selva ..... "
*Bell Creek ..... "
*Vaughan ..... "
*Greendale ..... "

Deep Water Branch,
Via Deep Water, W. Va.

*Robson ..... W Va

Paint Creek Branch,
Via Pratt, W. Va.

*Scales ..... W Va
*Mucklow ..... "

Cabin Creek Branch,
Via Coalburg, W. Va.

*Dry Branch ..... W Va
*Ronda ..... "
*Fairfield ..... "
*Coal Fork ..... "
*Alum Lick ..... "
*Leewood ..... "
Acme ..... "
*Empire ..... "

SCIOTO DISTRICT.

Huntington Division.

St. Albans ..... W Va
*Lewis ..... "
Soaft ..... "
Scott ..... "
Tears ..... "
Hurricane ..... "

Huntington Div.—Con.

Milton ..... W Va
Ona ..... "
Barboursville ..... "

Sciotoville Branch,
Via Sciotoville, W. Va.

*Limwood ..... W Va
*Imes ..... "
*Salt Rock ..... "
West Hamlin ..... "

Sciotoville Br.—Con.

*Sheridan ..... W Va
*Hadley ..... "
*Hill ..... "
Midkiff ..... "

KENTUCKY DISTRICT.

Huntington Division.

Ona ..... W Va
*Ohama ..... "
Norma ..... "
Olyphant ..... "
Hanson ..... "
Ky. ..... "

Huntington Div.—Con.

*Ashland Junc. ..... Ky
*Ballestate ..... "
*Amanda ..... "

Kentucky Division.

Sewell ..... Ky
*Worland ..... "
Riverton ..... "
Louisa ..... "
*Moonlight ..... "
*Richardson ..... "
Peach Orchard ..... "

Kentucky Div.—Con.

Grand Rapids ..... Ky
*Hammond ..... "
*Steele Creek Mines ..... "
*Mt. Savage ..... "
K. K. Junction ..... "
*Corey ..... "

Supplement No. 1187	Chesapeake and Ohio Railway: FREIGHT TARIFF NO 11032 Superseding No. I0932	I C C No 2374
Change; Advance		Superseding No 2386

FREIGHT TARIFF
OF THE CHESAPEAKE AND OHIO RAILWAY COMPANY

ON

BITUMINOUS COAL, CAR LOADS

Freight charges to be assessed on basis of actual weight as ascertained by track scales at regular coal weighing points, subject to a minimum of 15 tons per car.

TO

Newport News, Va.

When destined beyond the pages

From

New River District	$1.35 per ton of 2240 pounds
Kanawha District	$1.45 per ton of 2240 pounds
Guyandotte District	$1.55 per ton of 2240 pounds
Kentucky District	$1.65 per ton of 2240 pounds

See Circular No. 1557, I C C No 2380 Grouping of Coal Districts

(Expires March 31st, 1908.

Issued Richmond, Va., [illegible] 1907, Effective April 1st, 1907

The amount of any loss or damage for which the carrier becomes liable shall be computed on the basis of the value of the property at the time and place of shipment, unless a lower value has been agreed upon.

Under this Tariff, when freight is to be [illegible] by consignee, demurrage will be charged at the rate of [illegible] per car per day, or fraction thereof, for delay beyond 48 hours (excluding Sundays and holidays), will be added to the [illegible] charges, and constitute a part of the total charges to be collected by the carrier on the property; except, however, where in connection with [illegible] or local regulations at the shipping point or destination, in which case such other provisions or local regulations shall prevail.

F. M. WHITAKER,
Freight Traffic Manager, C. & O. Ry.,
Richmond, Va.

E. D. HOTCHKISS,
General Freight Agent, C. & O. Ry.,
Richmond, Va.

Issued by
JNO. F. ORNDORFF,
Asst General Freight Agent, C. & O. Ry.,
Richmond, Va.

ACT CONCERNING CORPORATIONS,

Approved Extra Session 1902-3, p. 480.

Sec. 47. Any railroad corporation of this State, now existing, or that may hereafter be organized, shall have power, when authorized by its board of directors, to guarantee or to become surety in respect of bonds or other obligations, or either, of other corporations (whether incorporated within or without this State), organized for the purpose or having the power, either by ownership of stock or otherwise, to own or to become interested in, or to carry on a transportation business by land or by water, or other business from which such railroad corporation shall seek to derive traffic.

Chap. 267.—An Act to authorize the Chesapeake and Ohio railway company to acquire or acquire an interest in extensions and additions to its system of railroads within and without this state, and to acquire, hold, or guarantee the stock and bonds, or either, of other corporations.

Approved February 16, 1901.

1. Be it enacted by the general assembly of Virginia, That in addition to the powers which it now possesses, the Chesapeake and Ohio railway company shall have, and from time to time, as occasion arises, may exercise the following powers, or any of them—viz:

(a) That with the approval of its stockholders by a resolution adopted at a meeting by the affirmative vote of those owning or representing at least three-fourths of the entire capital stock of the company, it may from time to time lease, use, operate, consolidate with itself or purchase or otherwise acquire any railroad or other transportation company now or hereafter incorporated under the laws of the state of Virginia, or by the laws of the United States, or any of the states thereof, or any one or more of such railroad or transportation companies, or any other railroad or transportation company or companies

which are now or hereafter may be leased, or used, or operated by, or consolidated with any one or more of such railroad or transportation companies; and from time to time it may consolidate with its capital stock, property and franchises, by change of name or otherwise, the capital stock, property and franchise of any other railroad or transportation company, power being hereby granted to any railroad or transportation company or companies incorporated by or under any act or acts of the general assembly of the state of Virginia, by a resolution of its stockholders, adopted at a meeting by the affirmative vote of those owning or representing at least three-fourths of the entire capital stock of the company, to make and carry out such contracts of consolidation or lease, sale or other method of acquisition: provided that in all consolidations a copy of the agreement therefor shall be filed in the office of the secretary of the commonwealth of Virginia, and that any corporation of this state with which said Chesapeake and Ohio railway company may consolidate, or which it may lease, shall remain subject to the jurisdiction of the courts of this state; and all lines of railroad operated by it in the state of Virginia shall be subject to the general laws of this state; and, provided further, that any stockholder of such railroad or transportation company incorporated under the laws of the state of Virginia, other than the Chesapeake and Ohio railway company, who dissents from any such consolidation may within sixty days thereafter apply by petition to the circuit court of the city of Richmond to determine the value of his stock, and shall be entitled to receive from said Chesapeake and Ohio railway company the value as thus determined of such stock upon transfer thereof to the said Chesapeake and Ohio railway company.

(b) The Chesapeake and Ohio railway company may from time to time purchase, own and hold bonds or other evidences of debt and the shares of capital stock of any corporation or corporations organized under the laws of this or any other state or of the United States for the construction or operation of any railroad or other means of transportation, and may from time

to time guarantee or assume the bonds, evidences of indebtedness or capital stock of any such corporation or corporations.

2. All taxes and debts due or to become due the commonwealth of Virginia by the said Chesapeake and Ohio railway company shall be paid in lawful money of the United States and not in coupons.

3. This Act shall be in force from its passage.

Chap. 206.—An Act to enable the Chesapeake and Ohio Railway Company to acquire, or acquire an interest in, extensions, or additions to its system of railroad outside this State, and to create stock and deeds of trust or mortgages, or to guarantee bonds for that purpose.

Approved February 13, 1890.

1. Be it enacted by the General Assembly of Virginia, That for the purpose of extending the system of railroads owned or operated by it, the Chesapeake and Ohio Railway Company be, and it hereby is, authorized to acquire, or acquire an interest in, railroads outside this State forming extensions or additions to said system, as now or hereafter existing, by purchase, consolidation, merger, lease, stock ownership, or otherwise, and to create deeds of trust or mortgages on any property or interest so acquired, or guarantee the mortgage bonds of any railroad so acquired; also to create and issue such additional amounts of stock as the company may deem expedient for the purpose of such acquisition.

2. This Act shall be in force from its passage.

AN ACT

To authorize the Chesapeake and Ohio Railway Company to acquire or guarantee the stock and bonds of any steamship company or companies now or hereafter running to or from any port or ports in Virginia.

Approved December 18, 1889.

1. Be it enacted by the General Assembly of Virginia, That

the Chesapeake and Ohio Railway Company be and is hereby authorized to acquire or guarantee the stock and bonds, or either, of any steamship company or companies now or hereafter running to or from any port or ports in Virginia.

2. This Act shall be in force from its passage.

AN ACT

To authorize the Chesapeake and Ohio Railway Company to aid in the development of business along its line by acquiring or guaranteeing the stock and bonds of mining, manufacturing and other industrial enterprises connected therewith.

Approved December 18, 1889.

1. Be it enacted by the General Assembly of Virginia, That the Chesapeake and Ohio Railway Company be and is hereby authorized to aid in the development of business along its line by acquiring or guaranteeing the stock and bonds of mining, manufacturing and other industrial enterprises connected therewith.

2. This Act shall be in force from its passage.

State of Ohio, }
County of Hamilton, } ss.:

M. E. Ingalls, being duly sworn deposes and says: That on the third day of December, 1896, he was President of The Chesapeake & Ohio Railway Company, having been such President since October 1, 1888; that when he became such President he found in effect upon the said Chesapeake & Ohio Railway a system which he learned had prevailed since about the year 1874, shortly after the road was opened for coal traffic, whereby the coal was handled by a separate and distinct depart-

ment of the railway company, the mine operators delivering for an agreed price at the mines to the coal agent of the railway company all coal mined by them, the net result realized from the seling price of the coal representing the freight earned by the railway company; this system he learned had been inaugurated and carried on by the mutual agreement between the railway company and the mine operators and for their mutual benefit as a means of obtaining the best market and results in the disposition of the coal mined on the line of the railway company; that as such President he continued this system of handling and disposing of all such coal; that on the said third day of December, 1896, he, in the name of and in behalf of The Chesapeake & Ohio Railway Company, made a contract with the New York, New Haven & Hartford Railroad Company, whereby the Chesapeake & Ohio Railway Company agreed to furnish said New York, New Haven & Hartford Railroad Company not to exceed two million gross tons of bituminous coal from mines along its line, in such quantities monthly as wanted, from July 1, 1897, to July 1, 1902, without charge for demurrage, deliveries to be made at not exceeding four hundred thousand tons per annum; that the New York, New Haven & Hartford Railroad Company agreed to pay for said coal at the rate of two dollars and seventy-five cents per gross ton, New Haven basis, settlements to be made monthly; that during the year 1896 it was exceedingly difficult to find a market for the coal mined along the line of the Chesapeake & Ohio Railway; that being convinced that the output of coal from the mines along the line of the Chesapeake & Ohio Railway would be limited, that mine operators would be unable to keep their men employed, and that much of the large equipment belonging to the railroad company would lie idle, he, the said M. E. Ingalls, made the contract above named; that while the price contracted by said New York, New Haven & Hartford Railroad Company to be paid for the coal covered the cost of the coal and all expense incident to its delivery, a further inducement to the contract was that thereby the mines along the line of the Chesapeake & Ohio Railway

might be kept in operation, employment furnished to the miners, and the coal cars and motive power which had been purchased by the Chesapeake & Ohio Railway Company with a view to this business, should be kept employed; that as soon as said contract was made he, the said M. E. Ingalls, made arrangements with Mr. J.L. Beury, the Geenwood Coal and Coke Company, and the Laurel Creek Coal and Coke Company, whereby the said operators undertook to furnish the coal to supply this contract; that this arrangement was subsequently assumed by an association composed of practically all the operators in the New River District, and so long as he, the said M. E. Ingalls, remained President of The Chesapeake & Ohio Railway Company, which was until the first day of February, 1900, the said coal was furnished either through Mr. J. L. Beury, the Greenwood Coal and Coke Company, the Laurel Creek Coal and Coke Company, or the associated miners, who undertook to carry out the arrangement. And this deponent further states that in order to secure a suitable water rate he, the said M. E. Ingalls, as President of The Chesapeake and Ohio Railway Company did, upon the 31st day of December 1897 enter into a contract with the Atlantic Transportation Company, a corporation duly organized and existing under the laws of the State of New Jersey, whereby said Atlantic Transportation Company undertook to carry and transport coal from the port of Newport News to

New York for forty-five cents,	(on board)
New Haven, fifty cents,	"
New London, fifty cents,	"
Providence, fifty cents,	"
Fall River, fifty cents,	"
New Bedford Coal pockets, fifty cents,	"
All other ports (shoal water) sixty cents,	"
Northeast of Cape Cod, sixty cents,	"

bridge allowance to be two cents per ton for each and every bridge.

This deponent as above stated, arranged for the coal at seventy

cents per ton, and for water rate to New Haven at fifty cents per ton, thus providing, as far as it was in his power to do so, an exceedingly beneficial arrangement for The Chesapeake and Ohio Railway Company, of which he was President, and one which, if the contract for the furnishing of the coal at seventy cents per ton, and for the water transportation at fifty cents per ton, had been complied with by the parties with whom said contracts were made, and who were amply able to comply with said engagements at the time said contracts were made, would have yielded a profit to The Chesapeake and Ohio Railway Company over all expenses of not less than one dollar and thirty-five cents per ton. And this deponent further says that in this whole matter he, the said M. E. Ingalls, acted according to his judgment in the best interests of all concerned; that he, the said M. E. Ingalls, regards the contract which The Chesapeake and Ohio Railway Company made through him with the New York, New Haven and Hartford Railroad Company as having saved the Chesapeake and Ohio Railway Company a place in the market, having kept the mines along its lines going and the mine-laborers employed therein at work, and kept the said coal in the market; that the said arrangement was of the greatest benefit not only to The Chesapeake and Ohio Railway Company but to the community served by it known as the New River Coal District.

M. E. Ingalls.

Subscribed and sworn to before me this 12th day of October 1903.

Joseph Moses.
Notary Public.

My Commission expires on the 29th day of January 1904.

CIRCUIT COURT OF THE UNITED STATES,
WESTERN DISTRICT OF VIRGINIA.

Between
The Interstate Commerce Commission,
Petitioner
and
The Chesapeake & Ohio Railway Company and The New York, New Haven & Hartford Railroad Company,
Defendants.

Affidavit of John M. Hall, President of defendant the New York, New Haven & Hartford Railroad Company.

John M. Hall of New Haven, Connecticut, being sworn, on oath deposes and says as follows:

I am a Director of the defendant The New York, New Haven & Hartford Railroad Company. From the year 1893 to 1899 I was Vice-President of defendant and from 1899 to the present time have been its President. I am familiar with all the circumstances in connection with the coal contract with the Chesapeake & Ohio Railway Company, which is the subject matter of the petition in this cause, and as President I made the arrangement with the Chesapeake & Ohio Railway Company, through its President, under which the latter company has been making deliveries of coal to this defendant during the present year.

This defendant is not now and never has been a shipper of coal over the lines of the Chesapeake & Ohio Railway Company. This defendant requires and uses in connection with its business of operating a railroad, a large amount of coal annually which it is necessary to procure by contract and purchase. It has long been the custom of this defendant to enter into contracts covering a period of years, whereby it secured at a uniform rate a supply of coal to be delivered on the line of its own railroad at

different points in New England or New York State. On or about December third, 1896, this defendant entered into a written contract with the Chesapeake & Ohio Railway Company, for the delivery by the latter of two million gross tons of bituminous coal in such monthly quantities as wanted by this defendant from July 1, 1897, to July 1, 1902, a substantial copy of which contract is annexed to the petition in this cause. Neither this defendant nor its officers had any knowledge of the price that the Chesapeake & Ohio Railway Company expected to pay for the coal at the mines, nor of the tariff rates at that time existing from the mines to Newport News, the cost of handling at Newport News, nor the water freights from Newport News to New Haven, Connecticut; Providence, Rhode Island; or Boston, Massachusetts.

The Chesapeake & Ohio Railway Company entered upon the performance of said contract, and for several years annually made deliveries to this defendant of the quantities of coal called for by said contract, rendered its bills for the same at the contract price, and was in due course paid therefor by this defendant.

During the winter of 1900-1901 the Chesapeake & Ohio Railway Company by reason of strikes and other disturbing causes failed to make delivery of the full quantity of coal due under the contract for that year, and by reason of such failure this defendant was compelled to and did supply itself with large quantities of coal from other sources to make up said deficiency, and was compelled to and did pay for the same a greater price than that fixed by said contract, whereby a just and legal claim for damage and reimbursement arose in favor of this defendant against the Chesapeake & Ohio Railway Company to the amount of about $160,000, which claim was settled and compromised by the acceptance of about $120,000, which sum the Chesapeake & Ohio Railway Company paid this defendant in liquidation of said damages.

Early in the year 1902 a general strike of coal miners paralyzed the coal industry, greatly restricted the supply of

coal, enhanced enormously its price, and rendered it impossible for the Chesapeake & Ohio Railway Company to fully deliver the 400,000 tons of coal required to complete said contract for the last year of its term. On the 1st of July, 1902, when the whole of said deliveries should have been made, the Chesapeake & Ohio Railway Company was short in its delivery 59,966 tons. Many times during the year 1902 and prior July 1st in said year, this defendant demanded from the Chesapeake & Ohio Railway Company that it should perform its contract and deliver to this defendant the number of tons of coal due under said contract, but the Chesapeake & Ohio Railway Company pleading its inability to obtain said coal for such delivery, failed to supply and deliver the same within the period of its contract, and as from time to time requested by this defendant; so that it became necessary for this defendant, in order to obtain a supply of coal for the use of its engines and other purposes, to go into the open market and buy other coal in lieu of the 59,966 tons which it had contracted for and which the Chesapeake & Ohio Railway Company ought to have delivered to it for its use. In so doing this defendant was required to pay for the coal so obtained from outside parties a sum largely in excess of the price it would have been required to pay to the Chesapeake & Ohio Railway Company for said coal if delivered under the contract aforesaid, the amount of such excess being $103,910.69, which amount represented the pecuniary loss and damage sustained by this defendant by reason of the failure of the Chesapeake & Ohio Railway Company to deliver to it the full amount of coal due upon the last year of said contract.

This defendant made claim and demand against the Chesapeake & Ohio Railway Company for a reimbursement of said sum of $103,910.69, and insisted and required that the same should be made good to it. The Chesapeake & Ohio Railway Company, through its President, not denying its legal obligation under said contract and admitting its liability to make good the loss sustained as aforesaid by this defendant by reason of the failure of the Chesapeake & Ohio Railway Company to per-

form said contract, nevertheless, on account of the hardship of the case and the fact that its non-performance of said contract was not due to its own fault, but to a condition of affairs over which it had no control, suggested to me as President of this defendant that instead of paying the amount of said bill for excess, it would, although the period for performance had expired, still carry out the said contract and supply to this defendant the deficiency of 59,966 tons of coal, and this defendant recognizing also the hardship of the case and the unusual circumstances that had brought about the failure of the Chesapeake & Ohio Railway Company to perform its contract in full, did consent to accept and receive from it, in lieu of the payment of said sum of damages, the delivery of the 59,966 tons of coal still in arrears under said contract, and thereupon an adjustment and arrangement were orally made between this defendant and said vendor, and the Chesapeake & Ohio Railway Company immediately entered upon the performance thereof, and at the time of the filing of the complaint in this matter before the Interstate Commerce Commission, had delivered to this defendant 34,010 tons, leaving 25,956 tons of the amount of said deficiency still to be delivered.

The arrangement last made was not a new and independent contract, but was in fact a virtual extension of the time of the performance of the original contract.

Except upon information this defendant has no knowledge of the price at which said coal is procured at the mines by the Chesapeake & Ohio Railway Company, nor has it, except upon similar information, any knowledge as to the cost of handling the same or the rates paid by the Chesapeake & Ohio Railroad Company for the transportation of said coal from Newport News to New England; and as a matter of fact this defendant is not concerned in any degree as to whether the Chesapeake & Ohio Railway Company is furnishing said coal at a loss or at a gain.

The Chesapeake & Ohio Railway Company has always held itself out as legally authorized to sell and contract for the sale and delivery of coal, and the fact that it had made such sales

and deliveries of coal, and the fact that it had made such sales and deliveries of coal to various parties, including this defendant, is and has been well known for many years and the existence of the contract between it and this defendant was not in any wise hidden or concealed.

The original contract of 1896, and also the supplemental contract covering the delivery of the 59,966 tons were made in the State of New York, and the place of performance of the original contract was to be in the States of Connecticut, Rhode Island and Massachusetts, and of the supplemental contract in the States of Connecticut and Rhode Island.

On information and belief I will state that during the earlier years of the contract of 1896 the Chesapeake & Ohio Railway Company realized a good profit from the contract in addition to the entire cost of the coal and the cost of handling and all ocean freights and tariff rates of transportation. If during the later years of the contract the deliveries of coal by the Chesapeake & Ohio Railway Company were at a loss, it is because the price which the latter company had to pay for its coal has increased and because the rates of transportation have been increased during the life of the contract.

This defendant does not receive and has not received at any time any rebate or advantage of any kind in the transportation of coal over the lines of the Chesapeake & Ohio Railway Company. It is not shipping and never has shipped any coal over said lines, and is not concerned in any way in the cost of such transportation or in the rates charged for the same. It has not now and never has had during its dealings with the Chesapeake & Ohio Railway Company any purpose or desire to transgress, evade or in any way nullify the provisions of the Interstate Commerce Law as to uniform rates of transportation.

JOHN M. HALL,
President of The New York, New Haven
& Hartford Railroad Company.

On this 18th day of September, 1903, personally appeared before me John M. Hall of New Haven, Connecticut, known to

me to be the President of The New York, New Haven & Hartford Railroad Company, and made oath that the above affidavit and the statements therein contained are true.

JOHN G. PARKER,
Notary Public.

State of Virginia,
City of Richmond, } ss.

E. D. Hotchkiss being first duly sworn, deposes and says:

That he is the General Freight Agent of the Chesapeake & Ohio Railway Company, having been such General Freight Agent since January 1, 1887; that previous to that time and beginning on the first of September 1873, he had been employed in various positions in the office of the then General Freight Agent; that the Chesapeake and Ohio Railway was completed through to the Ohio River about one year previous to his entering the service of said company; that at that time the Kanawha District where there was access to the Kanawha River was the only portion of the line upon which coal development had been made and this on account of having the benefit of river transportation by barge; that as the road was completed and put in operation the coal traffic commenced to move; that from 1872 to about the close of the year 1874 this coal traffic destined for the east was handled in a spasmodic way by dealers in Virginia territory only, each mine operator selling direct to the coal dealer; that in the early part of 1875 at the solicitation of certain mine operators some very crude arrangement was made by the railway company for marketing coal in the east, and that being prior to the extension of the Chesapeake and Ohio Railway to deep-water at Newport News, facilities were established at what was formerly known as James River Wharves, just east of Richmond, at which point small vessels were loaded with coal and the same marketed at Norfolk and other seaboard points, and later on the territory was extended to cover eastern points;

that in 1881 and 1882 the Chesapeake and Ohio Railway Company extended its line to deepwater at Newport News and the crude arrangement previous in effect with reference to the marketing of West Virginia coal at tide-water points was, at the solicitation of the mine operators, perfected and enlarged, and coal wharves were established at Newport News for the shipment of coal to eastern territory, Baltimore, Philadelphia, New York and New England points; that the original arrangement was made between the mine operators and the late General W. C. Wickham, then the Second Vice-President and General Manager of the Chesapeake and Ohio Railroad Company, and later when the arrangement was more thoroughly perfected the First Vice-President of the Chesapeake and Ohio Railway Company, Mr. A. S. Hatch, had charge of the department which handled the coal; that General Wickham died in 1888 and Mr. Ingalls became the President of the Chesapeake and Ohio Railway Company that year. And this deponent further states that this arrangement, which was in effect the handling of the coal through a separate department of the Chesapeake and Ohio Railway Company continued in force until the year 1895 when the West Virginia Legislature passed a law prohibiting transportation lines from being in the business of buying and selling coal; that the arrangement in brief was that the Railway Company agreed to market the coal at the highest obtainable price, paying the vessel freights, insurance and other charges, and the remainder divided upon an agreed basis between the mine operators and the Railway Company, subject to certain minimum prices to be paid for the coal on board cars at the mines, the amount paid to the operator for his coal and the amount retained by the railway company as its freight charges being dependent upon the prices obtained for the coal in the east, such figures, of course fluctuating, more or less, according to market conditions and other circumstances; that as above stated this arrangement continued in effect until the year 1895 when the West Virginia Legislature passed a law prohibiting transportation lines from buying and selling coal, and that following the

passage of this law the business was handled as follows: A corporation known as the Chesapeake and Ohio Coal Agency Company, organized under the laws of the State of New Jersey, and in which the Chesapeake and Ohio Railway Company had no stock or other interest, was organized and made the agency of the New River and Kanawha Coal Operators for the purpose of marketing their coals destined beyond the Capes of Virginia in Eastern Territory, such agency being responsible directly to the operators for the price of the coal as fixed f. o. b. at the mines. This agency was the sole shipper of coal from said mines to Newport News, destined beyond the Capes, and continued to be the sole agency until about the first of April 1900, when certain of the coal operators established two other agencies, known as the C. & O. Coal and Coke Company and W. C. Atwater and Company, which operated in the same territory with the Chesapeake and Ohio Coal Agency Company. These three agencies were the only shippers of coal from said mines to Newport News, destined beyond the Capes, and continued to be the sole agents until about the first day of March 1902, when certain other operators established another agency called the Smokeless Fuel Company which operated in the same territory along with the three agencies above named. These are the four principal agencies. Since that time however, the following additional shippers have been engaged in the handling of coal beyond the Virginia Capes to the same territory, to-wit:

John T. Hesser and Company, about April 1, 1902.

E. A. Willard and Company, about February 1, 1903.

Kanawha Fuel Company, about July 1, 1903.

These agencies arrange for vessels and for their freight and make a delivery price of coal in the eastern market.

And this deponent further states that the method of handling the coal as inagurated by the Chesapeake & Ohio Railway Company was sought and earnestly advocated by the mine operators; that it resulted in a largely increased development in the Kanawha District, and later in the entire development of the New River District, and he further states that he is of opinion that the

development of the coal traffic of the Chesapeake and Ohio Railway Company would not have been anything like so great had not the arrangement been in effect between the operators and the railroad company which resulted in the railroad company finding a market for the coal as stated herein. And this deponent further states that as to the making of the New Haven contract he had no personal knowledge at the time, but that he does know that the movement of coal became at once known to the operators along the line of the Chesapeake and Ohio Railway; that years ago he had conversation with many of them in which they manifested their full knowledge of the details of the contract; that the contract was widely known and upon the failure of certain of the mine operators who had arranged for the delivery of the specific amount of two million tons to carry out their engagement it was arranged by an association composed of practically all of the operators in the New River District to furnish the tonnage called for by this specific contract and for this specific purpose, and the coal was furnished thereunder up to the strike in the New River District which occurred on June 7, 1902.

E. H. Hotchkiss.

Subscribed and sworn to before me this 15th day of October 1903.

Columbus A. Canepa,
Notary Public.

My Commission expires September 17, 1907.

State of West Virginia, }
County of Kanawha, } to-wit:

J. R. Thomas, being duly sworn, deposeth and saith that his residence is in the City of Charleston, county of Kanawha, state of West Virginia; that he is engaged in the business of mining and shipping coal; that he is President of the Carbon Coal Co., and has been such President since April 1st, 1902, and commenced shipping coal from the Carbon Coal Company in Novem-

ber 1902, the latter company operating in Kanawha District of West Virginia; that he is also President of the Kanawha Fuel Company, which latter company is a selling agency company organized under the laws of the State of West Virginia, and handles the entire output from 35 mines, which produce 59% of the entire tonnage from the Kanawha field on the line of the Chesapeake & Ohio Railway Company, known as the Kanawha District, and practically the entire tonnage from the Kanawha District for tidewater destined beyond the Capes since first day of April 1903; that prior to his engaging in business on the line of the Chesapeake & Ohio Railway Company, and since the year 1894, he had been engaged in like business on the line of the Kanawha & Michigan Railway Company in West Virginia on the north side of the Kanawha river, the C. & O. line being on the south side of the river; that while so engaged in business on the line of the K. & M. Ry. Co., he learned of the making of the contract between the Chesapeake & Ohio Railway Company and the New York, New Haven & Hartford Railroad Company, whereby the Chesapeake & Ohio Railway Company was obligated to furnish or cause to be furnished to the New York, New Haven & Hartford Railroad Company about two million tons of coal in annual deliveries of about four hundred thousand tons; that he learned of the making of this contract at or about the time it was made; that the making of the said contract was widely known not only amongst the operators along the line of the Kanawha & Michigan Railway Company, but it was also widely known amongst the operators in both the New River and Kanawha Districts along the line of the Chesapeake & Ohio Railway.

And the affiant further stated that in March or April of the year 1903, he ascertained that there was a balance of about sixty thousand tons of coal undelivered upon this contract, and he ascertained further that there was a probability of Kanawha coal being taken for the balance of said sixty thousand tons instead of New River coal; that he further understood that an opportunity had been given to the coal operators of New River District to finish the contract, but they had declined; that at this

time and prior to about the first of July, 1903, the C. & O. Coal & Coke Company, of which Mr. C. J. Wittenberg was President, had handled all of the Kanawha Fuel Company's coal from said Kanawha District destined for shipments beyond the Capes; that about the middle of April 1903 a verbal arrangement was made between said affiant, C. J. Wittenberg, President of the C. & O. Coal & Coke Co., and Geo. W. Stevens, President of the Chesapeake & Ohio Railway Company, whereby sixty thousand tons of run of mine Kanawha coal should be delivered to the New York, New Haven & Hartford Railroad Company to finish out the amount of the coal undelivered upon said contract; that the price at which said coal was to be delivered by said Kanawha Fuel Company was one dollar and fifteen cents per net ton, or one dollar and twenty-eight cents per gross ton; that said Wittenberg's company which was then acting as the eastern or tidewater agent of said Kanawha Fuel Company was to handle the movement of said coal beyond the Capes, making deliveries to the New York, New Haven & Hartford Railroad Company, and making settlements with the Chesapeake & Ohio Railway Company and the Kanawha Fuel Company respectively; that the furnishing of said sixty thousand tons of Kanawha coal was apportioned equitably amongst all of the mines of which the Kanawha Fuel Company is agent; that prior to concluding the arrangement to furnish the said sixty thousand tons of coal from Kanawha District, said affiant communicated with all of the independent operators producing the character of coal necessary to apply on this contract not represented by the Kanawha Fuel Company advising them of what he proposed to do, and offering them an interest in said sixty thousand tons, based upon their *pro rata* share of the tonnage, in accordance with the capacities of their respective mines, which offer was declined.

Affiant further states that the supplying of said sixty thousand tons as aforesaid constituted no discrimination against any coal or class of coal produced in Kanawha District for shipment beyond the Capes.

Affiant further states that the Kanawha Fuel Company has

never quoted any price on coal to W. C. Bullitt, or been asked to do so; that said W. C. Bullitt is a shipper of coal known as Pocahontas coal originating on the line of the Norfolk & Western Railway Company, and that said W. C. Bullitt is not and has never been a shipper of coal over the line of the Chesapeake & Ohio Railway Company from either the Kanawha District or New River District.

J. R. Thomas.

Subscribed and sworn to before me this 31st day of October, 1903. Given under my hand and seal the day and year aforesaid.

S. P. Richmond,
Notary Public.

State of West Virginia,
County of Kanawha, } to-wit:

William Brown, being duly sworn, deposeth and saith that his residence is in the City of Charleston, county of Kanawha, state of West Virginia; that he is a coal operator in the Kanawha District along the line of the Chesapeake & Ohio Railway Company; that he engaged in coal business in the said Kanawha District in June 1898, when he came over from England to take charge of the Great Kanawha Colliery Company; that when he assumed charge of this operation he ascertained that there was in existence a contract whereby the Chesapeake & Ohio Railway Company had to furnish the New York, New Haven & Hartford Railroad Company coal for a number of years at the rate of about four hundred thousand tons per annum; that said contract at the time was regarded as an exceedingly favorable contract for the Chesapeake & Ohio Railway Company; that at that time the company operated by said affiant was selling coal as low as fifty-five cents per net ton, or sixty-three cents per gross ton; that the existence of the contract was a public matter known to everybody interested in the coal business.

Affiant further states that he is the Secretary of the Kanawha

Fuel Company, has read the affidavit of J. R. Thomas with reference to furnishing sixty thousand tons of Kanawha coal to fill balance of coal undelivered on said contract, and that the statements contained in said affidavit in reference to said sixty thousand tons of coal are true and within the knowledge of said affiant.

WILLIAM BROWN.

Subscribed and sworn to before me this 31st day of October, 1903. Given under my hand and seal the day and year aforesaid.

S. P. RICHMOND,
Notary Public.

State of Ohio,
County of Hamilton, } to-wit:

Forest L. Garrison being duly sworn deposes and says that he resides in the City of Covington, State of Kentucky; that he is engaged in the business of mining and selling coal produced from the Kanawha District on the Chesapeake & Ohio Railway and has been so engaged for the past twenty years; that he is thoroughly familiar with the conditions of the coal trade from that District; that he is the President of the Shonk-Garrison Coal Company, a land company owning upwards of 16,000 acres of land in said District; that he is also President of the Stevens Coal Company an operating company, working the Keystone, Empire, and Acme Mines; that he is also President of the Kanawha Coal & Coke Co., which is the Selling Agency for the three mines above named and also for the Cabin Creek Coal Company, Raccoon Fork Coal Company, Thistle Coal Company, Cherokee Coal Company, Red Warrior Coal Company and Shamrock Coal Company; that he knows it to be a fact that the contract between the Chesapeake & Ohio Railway Company and the New York, New Haven & Hartford Railroad Company for the furnishing of 2,000,000 tons of New River coal in annual

installments of 400,000 tons was an open matter known practically to all the mine-operators in both the New River and Kanawha District; that there was no secret about it; that it became widely known immediately upon being made, and was regarded by the operators as an exceedingly beneficial contract to the mine operators in the New River field filling the contract; that the said contract was for New River Steam Coal and worked no discrimination or injury whatsoever against, or to, the operators in the Kanawha field or coal produced by them, or any of them; that it was a fact very generally known among the coal operators in both the New River and Kanawha District that when the strike occurred in June 1902 the New River District was short in the deliveries under this contract about 60,000 tons; that it was the general understanding among the said coal operators that an obligation rested upon the Chesapeake & Ohio Railway Company to deliver this 60,000 tons of coal; that it was also the general understanding among the said operators that there was an obligation on the operators in the New River *District* to supply the said 60,000 tons and had said strike not occurred affiant has no doubt that said New River operators would have furnished the same; that in March or April 1903 an opportunity was afforded to the companies represented by affiant to furnish the whole or any part of the residue of the undelivered coal but, owing to having all the business that could be taken care of by them, it was declined; that subsequently affiant learned that the Kanawha Fuel Company of which J. R. Thomas was president, had made an arrangement to supply said coal; that said Thomas before closing said arrangement notified this affiant of what he was doing and offered this affiant a pro-rata share of the tonnage based upon the output from the mines represented respectively; that this affiant declined to participate but expressed to the said Thomas his perfect willingness as the representative of his companies that he, the said Thomas, should help the Chesapeake & Ohio Railway Company, out of its obligation to the New Haven Road by supplying the 60,000 tons; and this affiant further says that he is familiar with the cir-

cumstances and conditions under which the arrangement to deliver the 60,000 tons was made, having had conference with the representative of the New River operators and also with the said J. R. Thomas; that this affiant knows that the reason said Thomas made the arrangement aforesaid was not because he wanted the business but because he wanted to help the Chesapeake & Ohio Railway Company fulfil its obligations, and this affiant further states that in furnishing the 60,000 tons to the New York, New Haven & Hartford Railroad Company no discrimination was practised by the Chesapeake & Ohio Railway Company against this affiant, or any shipper or miner of coal in the Kanawha District, or against any coal, or class of coal produced in said District, and that no injury was occasioned thereby to the business of this affiant or to the business of any other mine operator or shipper or shipping agency so far as this affiant knows and believes; affiant further states that he is slightly acquainted with Mr. W. C. Bullitt who is a member of the firm of Castner Curran & Bullitt, who are the Sales Agents for Pocahontas Coal, and who handle the bulk of the coal output along the line of the Norfolk & Western Railway, that so far as this affiant knowns and believes neither said Bullitt nor his firm are now or ever have been shippers of coal over the Chesapeake & Ohio Railway; and this affiant has not at any time either for himself or as acting for the companies he represents offered to sell any coal from the Kanawha District to said W. C. Bullitt, or been applied to for a price on said coal by said Bullitt or any representative of said Bullitt as far as affiant knows and believes.

F. L. Garrison.

Sworn to and subscribed before me this 2nd day of November, 1903, as witness my hand and official seal.

John R. Schindel,
Notary Public.

State of Virginia,
City of Richmond, } to-wit:

Samuel Dixon being first duly sworn, deposes and says: That he resides at Macdonald, in the County of Fayette, State of West Virginia; that he is the President and General Manager of the Macdonald Colliery Company, the Sugar Creek Coal and Coke Company, the White Oak Fuel Company and the Stuart Colliery Company, and engaged in the business of mining coal; that said companies above named are operating companies and are members of the New River Coal Operators Association; that said Association is composed of all the coal operators in said New River District; said Association having been formed for their mutual protection and the advancement of their mutual interests. Affiant further states that prior to September 1, 1893, he the said Samuel Dixon, was engaged in the business of mining coal in what is known as the Kanawha District along the line of the Chesapeake & Ohio Railway Company, but on or before the 1st of September, 1893, he the said Samuel Dixon severed his connection with the Kanawha District and from that time has confined his operations to what is known as the New River District, said operations above named being situated in the said New River District of the Chesapeake & Ohio Railway Company. Affiant further states that the rated capacity of his mines is twenty-six hundred and fifty tons of coal per day, but that it frequently exceeds that amount. Affiant further says that he is thoroughly familiar with the conditions surrounding the coal trade in the New River District, and also in the Kanawha District; that he has known of the contract between the Chesapeake & Ohio Railway Company and the New York, New Haven & Hartford Railroad Company for the supplying of two million tons of coal at the rate of four hundred thousand tons per year ever since that contract was made; that he knows that at the time it was made it was a matter of common knowledge and considered an exceedingly beneficial contract to the operators in the New River District; that he knows that it continued to be an advant-

ageous contract up to about the year 1900, when the price of labor advanced; that he knows that through and by means of said contract the coal operators in the New River District were enabled to get a better price for their coal than they would have gotten had the contract not been made. Affiant further knows that at about the time the said contract was made arrangements were made with Mr. Jos. L. Beury and two companies, of which he was the principal owner, to supply that contract, but that because of Mr. Beury's inability to put out that much coal annually, the said contract was transferred to the coal operators in the New River District as a whole, and the amount of coal put out each year distributed ratably among all the mines. Affiant further says that the making of the said contract constituted no discrimination against the Kanawha District; that he was well acquainted with the mine operators and the conditions under which the coal mining was carried on in the Kanawha District, and that the coal operators of the Kanawha District well understood the whole transaction and did not regard the said contract as in any manner discriminating against them or the coal produced by them. Affiant further says that had it not been for the strike which occurred in June, 1902, the whole of the two million tons of coal would have been furnished by the New River operators, but that total suspension of deliveries, under this contract, was caused on or about the 7th of June, 1902, by the strike which assumed very serious proportions, and which continued until July 14, 1903; that pending this period the operators of the New River District were engaged in fighting the strike vigorously and at great expense and their output was totally suspended for upwards of two months and greatly curtailed the balance of the period; that under these conditions the New River operators were unwilling to fill the said shortage of sixty thousand tons, except at a price which they recognized would be prohibitive, and they, therefore, agreed with Mr. Stevens, the President of the Chesapeake and Ohio Railway, that said balance of sixty thousand tons should be furnished, if he could make the arrangement, from the Kanawha District;

that he the said affiant was present at interviews with reference to the supplying of the balance of sixty thousand tons of coal, and that no discrimination was worked against the New River District or any coal produced in the New River District by reason of the coal being furnished from the Kanawha District. Affiant further says that subsequent to the interview of the representatives of the New River operators and the President of the Chesapeake and Ohio Railway Company, with reference to the New River Association furnishing the said sixty thousand tons of coal, he knows that the matter was taken up between the President of the Chesapeake and Ohio Railway Company, Mr. Geo. W. Stevens, and Mr. J. R. Thomas, the President of the Kanawha Fuel Company, and its Selling Agency, the C. & O. Coal & Coke Co., C. J. Wittenberg, President, and an arrangement made between them whereby Kanawha coal should be taken by the New York, New Haven & Hartford Railroad Company, instead of New River coal for the balance of said sixty thousand tons, and affiant further states that this arrangement was widely known among the operators in the New River District and the Kanawha District; that it was a matter of common knowledge, not only as to the shortage of the sixty thousand tons, but as to how it was going to be supplied, and that said arrangement to so supply the said Kanawha coal worked no discrimination against the operators in the New River field.

SAMUEL DIXON.

Subscribed and sworn to before me this 2nd day of November, 1903. Given under my hand and seal.

A. J. T. TREVVETT.
Notary Public.

My commission expires February 18, 1905.
No stamp required.

State of West Virginia,
County of Kanawha. } to-wit:

I, J. B. Petyon, Jr., a Notary Public in and for the county and state aforesaid, do certify that this day personally appeared before me Justus Collins, to me well known, who being duly sworn, deposeth and saith as follows:

That his residence is in the city of Charleston, county of Kanawha, state of West Virginia; that he is engaged in the business of mining coal at the Collins Colliery Company and the Whipple Colliery Company, in the county of Fayette, in said state of West Virginia, on the Loup Creek branch of the Chesapeake & Ohio Railway, which is a part of the New River District, and that he has been so engaged in such business since the year 1893; that he is the chairman of an association composed of all of the coal operators in said New River District which is known as the New River Coal Operators Association; that he is familiar with the terms of the contract which was made between the Chesapeake & Ohio Railway Company and the New York, New Haven & Hartford Railroad Company, whereby the Chesapeake & Ohio Railway Company agreed to furnish two million tons of coal to the New York, New Haven & Hartford Railroad Company at the rate of four hundred thousand tons per annum, and has been familiar with it since about the time that it was made; that the said contract was widely known amongst all of the coal operators in said New River District; that an arrangement was made between the Chesapeake & Ohio Railway Company and Joseph L. Beury for himself and certain companies in which he was largely interested whereby the two million tons were to be furnished at the price of seventy cents per gross ton at the mines, said price to be increased in the event of an increase in wages; that about 12 to 15 months subsequently said Beury turned over the said contract to the said New River Coal Operators Association to complete, and that said association furnished practically all of the coal to fill the said contract, the amount thereof being divided out amongst the various members of the said association upon an agreed allotment; that the said coal was

furnished by the said association at the price of seventy cents per ton up to about April 1st, 1900, when in consequence of an increase in wages, they demanded a corresponding increase in the price which was fixed at ninety-two and one-half cents per ton and so continued until about April 1st, 1901, when the price was again increased to ninety-five cents per ton, on account of a further increase in wages, which said price of ninety-five cents per ton was conceded by said operators on account of the obligation resting on them to supply the coal necessary to enable the Railway Company to comply with its obligation, notwithstanding the fact that said operators could and did realize about nineteen cents per ton more on the rest of the coal produced by them going to tidewater; that the coal miners strike which began June 7th, 1902, caused a suspension of the deliveries of coal by the said association and left a balance of about sixty thousand tons undelivered on the original contract; that full opportunity was given to the said association of New River operators to fill the remaining portion of said contract; that at an interview about the 1st of March, 1903, between Geo. W. Stevens, President of the Chesapeake & Ohio Railway Company, and said affiant and other operators representing and acting for all of the coal operators in the New River District, the request was made by the said Stevens that the said Association should complete the delivery of the said sixty thousand tons called for by said contract, to which request reply was made that while the said association recognized its obligation to complete the delivery of the said sixty thousand tons of New River coal, yet that on account of strike conditions existing in said District and the enormously increased expenses in producing said coal, the said coal operators were unwilling to furnish the said sixty thousand tons at that time, but if desired, would do so at some future period, and that if the said Stevens could make an arrangement to have the said sixty thousand tons of coal furnished from the Kanawha field, they were perfectly willing for him to do so; and subsequently they understood that an arrangement had been made to fill out said con-

tract with sixty thousand tons of Kanawha coal, and there was no discrimination in so doing; that it was well recognized amongst all of the coal operators, both in New River District and in Kanawha District, that the Chesapeake & Ohio Railway Company was under an obligation to cause the said sixty thousand tons remaining undelivered on the original contract as aforesaid to be delivered; that the whole transaction was well understood in both fields and worked no discrimination against either field; and the affiant further saith that at the time that the said original contract for the delivery of the two million tons of coal to the New York, New Haven & Hartford Company was made, the said contract was regarded by the coal operators as a most favorable and beneficial one for the New River District and it continued to be absolutely so for at least three years of its existence. Affiant further saith that he is now and has been for the past fifteen years engaged in large coal operations on the line of the Norfolk & Western Railway Company, and that at the time the said contract was made, and for a considerable period thereafter the coal sold on the line of the Norfolk & Western Railway Company, of like character, only netted the said operators on the said Norfolk & Western Railway the sum of fifty-nine cents per gross ton, whereas under the terms of the contract for that furnished the New York, New Haven & Hartford Railroad Company, the same netted the operations not less than seventy cents per gross ton throughout its life.

JUSTUS COLLINS.

Subscribed and sworn to before me this 30th day of October, 1903. Given under my hand and seal the day and year aforesaid.

J. B. PEYTON, JR.
Notary Public.

State of West Virginia,
County of Kanawha, } to-wit:

David T. Evans being duly sworn deposeth and saith as follows:

That he is a resident of Powellton, Fayette County, West Virginia; that he is General Manager of the Mount Carbon Company Limited; that he has been engaged in that business for past seventeen years in connection with that Company, and resident of Powellton; that his mines are in what is known as the Kanawha District on the line of the Chesapeake and Ohio Railway Company; that his Company is not connected with the Kanawha Fuel Company, but that it is known as an Independent Operation; that he has known of the contract between the Chesapeake and Ohio Railway Company and the New York, New Haven & Hartford Railroad Company by which the Chesapeake and Ohio Railway Company was to furnish the New York, New Haven & Hartford Railroad Company two millions tons of coal, making annual deliveries of about four hundred thousand tons, ever since about the time contract was made, and that he knows that the said contract has been widely known among the operators along the Chesapeake and Ohio Railway ever since it was made. The affiant further states that in the Spring of 1908 he learned that there was about sixty thousand tons of coal undelivered on said contract and that it was being supplied by the Kanawha Fuel Company. Affiant further states that he had an opportunity to share in the deliveries of this sixty thousand tons of coal and declined same, not desiring to handle it; that the delivery of this coal by the Kanawha Fuel Company worked no discrimination whatever against his Company. The affiant further states that his Company has not at any time quoted any prices on coal to W. C. Bullitt, or been applied to for a quotation.

D. T. Evans.

Subscribed and sworn to before me this 31st day of October,

1903. Given under my hand and seal the day and year aforesaid.

S. P. RICHMOND,
Notary Public.

State of West Virginia,
County of Kanawha. } to-wit:

James Kay being duly sworn deposeth and saith as follows:

That his home is in Charleston, W. Va.; that he is President and General Manager of the Cabin Creek Mining Company, Raccoon Fork Coal & Coke Co., Thistle Coal & Coke Co. and the Shamrock Coal & Coke Co., all of which operations are on the Cabin Creek Branch of the Chesapeake and Ohio Railway in what is known as the Kanawha District of West Virginia; that he has been shipping coal from these operations since November 1902; that prior to taking charge of these operations he was engaged as a coal miner and operator for several years in the New River District on line of the Chesapeake and Ohio Railway; that he has known of the contract between the Chesapeake and Ohio Railway Company and the New York, New Haven & Hartford Railroad Company for the delivery of two million tons of coal in annual deliveries of four hundred thousand tons ever since it was made, and that this contract was well known to every one interested in coal operations both in the New River and Kanawha fields from the beginning; that the Companies of which the affiant is President and General Manager as above stated are not represented by the Kanawha Fuel Company and are what is known as Independent Operations; that the affiant did not desire to participate in the delivery of the sixty thousand tons shortage on the contract above mentioned and was perfectly willing for the Kanawha Fuel Company to deliver said sixty thousand tons; that the delivery of this sixty thousand tons of coal by the Kanawha Fuel Company works no discrimi-

nation whatever against the coal of the Companies represented by the affiant.

This affiant further says that to his knowledge W. C. Bullitt never asked for or received a quotation on coal from the Companies represented by this affiant.

JAMES KAY.

Subscribed and sworn to before me this 31st day of October, 1903. Sworn to under my hand and seal the day and year aforesaid.

S. P. RICHMOND,
Notary Public.

State of West Virginia,
County of Kanawha. } to-wit:

E. P. Mucklow being duly sworn deposeth and saith as follows:

That his home is at Pratt, Kanawha County, W. Va., on the main line of the Chesapeake & Ohio Railway; that he is the Treasurer of the Scranton Splint Coal Company and the Paint Creek Coal Company, both of which operations are located in the Kanawha District of West Virginia along the line of the Chesapeake & Ohio Railway; that he has been connected with these Companies since their organization about two years ago; that prior to his connection with these Companies he resided at Scranton, Pa.; that the above mentioned Companies are not represented by the Kanawha Fuel Company, but are what is known as Independent Operations; that his Companies are miners of splint coal; that splint coal is what is known as domestic coal, and is a higher grade coal than is used for steam purposes; that he would not share in the delivery of the sixty thousand tons of coal, balance of tonnage due on the contract between the Chesapeake & Ohio Railway Company and the New York, New Haven & Hartford Railroad Company for the delivery of

two million tons of coal; that he has no objection whatever to the Kanawha Fuel Company furnishing this balance of sixty thousand tons of coal due as aforesaid, and that by so doing no discrimination whatever is worked against the coal of the Companies with which this affiant is connected.

And this affiant further says that all quotations on coal produced by his Companies are first submitted to him for approval, and that to his knowledge W. C. Bullitt never asked for or received a quotation on coal from the Companies with which this affiant is connected.

E. P. Mucklow.

Subscribed and sworn to before me this 31st day of October, 1903. Given under my hand and seal the day and year aforesaid.

S. P. Richmond,
Notary Public.

State of West Virginia,
County of Kanawha. } to-wit:

R. B. Cassady being duly sworn deposeth and saith as follows: That he resides in the city of Charleston, W. Va.; that he is Superintendent of the Winifrede Coal Company situated on the line of the Chesapeake & Ohio Railway in the Kanawha District of West Virginia, and has been connected with this mining operation as Assistant Superintendent and Superintendent for twenty years; that he has known of the contract between the Chesapeake & Ohio Railway Company and the New York, New Haven & Hartford Railroad Company to deliver two million tons of coal in annual deliveries of four hundred thousand tons ever since the said contract was made; that this contract was a matter of common knowledge among everyone interested in coal mining in both the New River and Kanawha Fields; that the Winifrede Coal Company is not represented by the Kanawha

Fuel Company, but is what is known as an Independent Operation; that this affiant did not desire to share in the delivery of this sixty thousand tons of coal due on the old contract above mentioned, which was being supplied by the Kanawha Fuel Company; that this affiant had no objections to this sixty thousand tons being furnished by the Kanawha Fuel Company, and that the furnishing of this sixty thousand tons by the said Kanawha Fuel Company works no discrimination whatever against the mines represented by this affiant.

This affiant further states that he has never quoted coal to W. C. Bullitt or been asked for a quotation on coal.

R. B. Cassady.

Subscribed and sworn to before me this 31st day of October, 1903. Given under my hand and seal the day and year aforesaid.

S. P. Richmond,
Notary Public.

State of West Virginia,
County of Kanawha. } to-wit:

D. A. Nease being duly sworn deposeth and saith as follows:

That he is President of the Kanawha & Coal River Coal Company which operates and controls a number of mines and the Kanawha & Coal River Railway, which mines and railway are situated in the Kanawha District of West Virginia on the line of the Chesapeake & Ohio Railway; that he has been connected with the Kanawha & Coal River Coal Company since its organization, and has been engaged in shipping coal since September 1901; that the above mentioned Company is not represented by the Kanawha Fuel Company, but is what is known as an Independent Operation; that his Company are miners of high grade splint or block coal called "Black Band;" that this coal is what is known as domestic coal and is a higher grade coal than is

used for steam purposes; that in the Spring of 1903 he learned there was about sixty thousand tons of coal undelivered on a contract between the Chesapeake & Ohio Railway Company and the New York, New Haven & Hartford Railroad Company for the delivery of a large tonnage of coal; that he had an opportunity to share in the delivery of this sixty thousand tons of coal and declined the same, not desiring to handle it; that he was perfectly willing for the Kanawha Fuel Company to deliver this sixty thousand tons of coal, and that by doing so no discrimination whatever was worked against the coal of the mines represented by the affiant.

The affiant further states that his Company has not at any time quoted any price on coal to W. C. Bullitt or been applied to by him for a quotation.

D. A. NEASE.

Subscribed and sworn to before me this 31st day of October, 1903. Given under my hand and seal the day and year aforesaid.

S. P. RICHMOND.
Notary Public.

State of New York, County of New York. } to-wit:

J. R. Clarke being duly sworn deposeth and saith, as follows: That his residence is in the City of Brooklyn, State of New York; that from January 1st, 1903, to September 1st, 1903, he was the mines agent for the sale of coal from the mines located on the Paint Creek Branch of the Chesapeake and Ohio Railway Company, in what is known as the Kanawha District in West Virginia; that his sales of coal for the mines aforesaid were made through the W. K. Niver Coal Company, Baltimore, Md.; that he has no independent recollection of the arrangement made with the Kanawha Fuel Company, at the time such arrangement was made, to supply the deficiency of 60,000 tons of coal due

on the contract between the Chesapeake and Ohio Railroad Company and the New York, New Haven and Hartford Railroad Company; that the matter may have been brought to his attention but that there was no occasion for his charging his memory with it; that he would not have cared to participate in the delivery of this 60,000 tons of coal due as aforesaid; that he had no objections whatever to the Kanawha Fuel Company furnishing this balance of 60,000 tons of coal,—and that by so doing no discrimination whatever was worked against the mines represented as aforesaid by this affiant.

And this affiant further says that the arrangement between himself, as the mines agent, for the sale of their coal as aforesaid and the W. K. Niver Company was that all quotations on coal purchased of the mines represented by this affiant should be made by this affiant to the W. K. Niver Company; and that the arrangement further was that all inquiries of the mines for quotations on coal should be referred to this affiant,—and that to his knowledge W. C. Bullitt never asked for or received a quotation on coal from the Companies with which this affiant was connected as aforesaid.

J. R. Clarke.

Subscribed and sworn to before me this 4th day of November, 1903. Given under my hand and seal the day and year aforesaid.

Elbridge F. Hills,
Notary Public,
New York Co.
No. 212.

District of Columbia,
City of Washington. } to-wit:

I, Martin S. Decker, a Notary Public in and for the City aforesaid and the District of Columbia, do certify that this day personally appeared before me William C. Bullitt, to me well known, who, being duly sworn, deposeth and saith as follows:

That in the month of June, 1903, he applied to J. W. Hopkins, of Richmond, Virginia, for a price on Kanawha coal, that said Hopkins is and for many years has been a large handler of coal from the line of the Chesapeake & Ohio Railway Company; that in reply to his inquiry said Hopkins offered to sell to him for shipment to Newport News and beyond the capes such quantity of Kanawha coal as said affiant might wish to buy, not to exceed, however, one thousand (1,000) tons per day; that the price named by said Hopkins was satisfactory to said affiant had he been able to secure the reduction in freight rate which he thereupon applied for to the Chesapeake & Ohio Railway Company.

WILLIAM C. BULLITT.

Subscribed and sworn to before me this thirteenth day of November, 1903.

Given under my hand and notorial seal the day and year aforesaid.

MARTIN S. DECKER,
Notary Public.

State of Virginia,
City of Roanoke, } to-wit:

This day personally appeared before the undersigned, A. B. Coleman, a Notary Public for the city and state aforesaid, D. H. Matson, who being duly sworn says:

That he is a Coal and Coke Broker in the City of Roanoke; that he has been in the coal business for nineteen years; that he was, for many years, President of the Pocahontas Coal Company through which company was handled almost the entire output of the Pocahontas Coal Fields; that after his association with that company as its President, he was the Manager at the City of Roanoke for the firm of Castner, Curran & Bullitt, who were Sales Agents for nearly the entire output of the Pocahontas Field; that since he left the firm of Castner, Curran & Bullitt, he has been in business for himself in the City of Roanoke as a Coal & Coke Broker and is engaged in selling coal; that he is also selling

the coal of the American Coal Company, No. 1 Broadway, New York, which company owns mines in the Pocahontas District.

Affiant further says that he is familiar with the course of business between the vendor and vendee of coal, and the course of business in making contracts for the sale of coal within his experience has been that the following clause, to-wit:

"Any portion of this tonnage not shipped by ——— on which date this contract will expire, shall be cancelled," or a clause permitting the seller to cancel all coal not delivered within the period provided for the by the contract upon certain conditions, has been and is the usual course of business among dealers in coal.

D. H. MATSON.

Subscribed and sworn to before me this 18th day of November, 1903.

A. B. COLEMAN,
Notary Public.

My commission expires January 23, 1906.

District of Columbia,
City of Washington, } to-wit

J. M. Smith, being duly sworn deposeth and saith, that his residence is the City of Washington, District of Columbia; that he is Auditor to the Interstate Commerce Commission; that in his office files are the tariff sheets of the railway companies which they are required to file with said Commission under the Act to regulate commerce, and Acts amendatory and supplementary thereto; and that he has immediate supervision of and knowledge of tariffs so filed by the railway companies under the Act aforesaid.

Affiant says that his attention has been called to a tariff sheet filed by the Chesapeake & Ohio Railway Company in the case of Interstate Commerce Commission against the Chesapeake & Ohio Railway Company and the New York, New Haven & Hartford Railroad Company, pending in the Circuit Court for the Western District of Virginia, which tariff sheet bears date "Richmond,

Virginia, April 10, 1895" and is "Through Freight Tariff No. 5177, rates of transportation taking effect April 15, 1895, via rail to Newport News, Virginia, thence via ocean and vessels, on bituminous coal," "from New River District" and "from Kanawha District" to "New York, N. Y.," which said tariff sheet is signed by E. D. Hotchkiss, General Freight Agent, and by W. P. Walker, Jr., General Freight Traffic Manager.

Affiant says that this tariff sheet has not been filed by the Chesapeake & Ohio Railway Company, or any one else, with the Interstate Commerce Commission.

Affiant further says that the tariff sheet above described and tariff sheets marked "I. C. C. No. 829" and "I. C. C. No. 845" which are filed by the Chesapeake & Ohio Railway Company in the above-styled cause, are not applicable upon coal shipped from the New River or Kanawha Districts, of West Virginia, to New Haven or points in New England, but that said rate sheets are only applicable, as appears on the face thereof, "to New York, N. Y."

And affiant further says that the first rate sheet applicable on bituminous coal from the New River District and Kanawha District, in West Virginia, to points in New England, which is filed in the record in the above cause, is freight tariff "I. C. C. No. 911" of the Chesapeake & Ohio Railway Company.

Affiant further says that according to the tariff sheets of the Chesapeake and Ohio Railway Company, which were filed with the Interstate Commerce Commission as required by law, the only rail rate applicable on coal shipped from New River District and Kanawha District, in West Virginia, to New Haven and other New England points from October 1, 1895, to January 2, 1899, was $2.00 per ton of 2,240 pounds to Newport News, Virginia, the same to be added to the ocean rate from Newport News to New Haven or other New England points.

Affiant says that there was no through rate filed by the Chesapeake & Ohio Railway Company on coal from New River or Kanawha Districts to New Haven or other New England points during the period aforesaid, and therefore the transportation charge

from the New River and Kanawha Districts to New England points was the local rate of $2.00 per ton to Newport News, added to prevailing ocean rates to New Haven and other New England points.

Affiant further says that effective October 1, 1895, the Chesapeake and Ohio Railway Company filed with the Interstate Commerce Commission its freight tariff on coal and coke from New River District and from Kanawha District to Newport News, which said freight tariff sheet is "I. C. C. No. 227" and "C. & O. Railway freight tariff No. 5375," and the rate in said tariff sheet as above described, affiant says applied to the transportation by the Chesapeake & Ohio Railway Company to Newport News of coal shipped from the New River and Kanawha Districts to New Haven and other New England points.

Affiant says that this original tariff sheet, "I. C. C. No. 227," is now in his possession and a copy thereof is herewith filed, and he is ready to produce the original for examination if required to do so.

Affiant says that effective January 2, 1899, the Chesapeake & Ohio Railway Company filed with the Interstate Commerce Commission a freight tariff on coal eastbound from the New River and Kanawha Districts to Newport News, which said freight tariff is "C. & O. Railway freight tariff No. 7964," and is "I. C. C. No. 826" superseding "No. 227," by which said tariff sheet the rate on coal from the New River District to Newport News was $1.55, and from the Kanawha District to Newport News was $1.70, per ton of 2,240 pounds, and which said rate and tariff sheets continued in effect over the Chesapeake & Ohio Railway on coal shipped from the New River and Kanawha Districts to New Haven and other New England points until March 8, 1899.

Affiant further says that from January 2, 1899, to March 8, 1899, the Chesapeake & Ohio Railway Company had not filed with the Commission a tariff sheet making any rate from New River and Kanawha Districts, in West Virginia, to New Haven or other New England points, and that the rates filed with the Commission and applicable over said railway on coal from said New River and

Kanawha Districts to New Haven and other New England points were the said rates of $1.55 and $1.70 to Newport News, the same to be added to the ocean rates to New Haven and other New England points, a correct copy of which said "C. & O. Railway freight tariff No. 7964" and "I. C. C. No. 826" is herewith filed; the original thereof being in the possession of affiant, which he is ready to produce for inspection when required to do so.

Affiant further says that the Chesapeake & Ohio Railway Company filed with the Interstate Commerce Commission, effective March 8, 1899, freight tariff No. 8155, "I. C. C. No. 911," on bituminous coal, carloads from the New River District and Kanawha District to Newport News "when destined beyond the capes," which said rate from the New River District was 90 cents per ton of 2,240 pounds, and from the Kanawha District was $1.15 per ton of 2,240 pounds.

And affiant further says that from March 8, 1899, down to and including the date (to-wit: July 13, 1903), at which the petition was filed in the Circuit Court of the United States for the Western District of Virginia in the case above referred to, that the tariff sheets filed in said cause by the Chesapeake & Ohio Railway Co., which affiant has examined, show correctly the rates over said railway on bituminous coal from the New River and Kanawha Districts, in West Virginia, to Newport News, Virginia, "when destined beyond the capes" and apply on shipments made from said New River and Kanawha Districts to New Haven and other New England points.

Affiant further says that the Chesapeake & Ohio Railway Company has never filed with the Interstate Commerce Commission a freight tariff on coal from the New River and Kanawha Districts, in West Virginia, through to New Haven or other New England points, but that the rate of the Chesapeake & Ohio Railway Company applicable to coal from the New River and Kanawha Districts to New Haven and other New England points up to March 8, 1899, was the rate on file with the Commission by the Chesapeake & Ohio Railway Company from the New

River and Kanawha Districts, in West Virginia, to Newport News, Virginia.

Affiant has made up from the tariff sheets on file with the Interstate Commerce Commission the rates of the Chesapeake & Ohio Railway Company applicable to coal shipped from the New River and Kanawha Districts, in West Virginia, to New Haven and other New England points, from October 1, 1895, to the time of filing of the petition in the above-styled cause, which said statement affiant herewith files as part of his affidavit.

J. M. SMITH.

Subscribed and swown to before me this 14th day of November, 1903.

Given under my hand and official seal the day and year aforesaid.

MARTIN S. DECKER,
Notary Public.

Exhibit to my affidavit.
J. M. Smith.
M. S. D.

Interstate Commerce Commission.
Auditor's Office, November 14, 1903.

Statement showing rates on Bituminous Coal, C. L. from New River and Kanawha Districts to Newport News, Va., when destined beyond the Capes; also the rates when destined to New York, N. Y., from October 1, 1895, to date.

From	RATES PER TON OF 2,240 POUNDS.				
	New River District.			Kanawha District.	
To Newport News, Va.	When destined beyond the Capes.	When destined to New York, only.		When destined beyond the Capes.	When destined to New York, only.
Date of Changes.	Bituminous Coal.	Steam Coal.	Run of Mine, Nut and Slack Coal.	Bituminous Coal.	Bituminous Coal.
October 1, 1895 to January 2, 1899	$2.00*	.....	.....	$2.50*	.....
January 2, 1899	[1]1.55*	.....	.....	[1]1.70*	.....
March 8, 1899.....	.90	.....	.....	1.15	.....
May 13, 1899.....	.80	.....	.....	1.05	.....
January 17, 1900 ...	.85	.....	.....	1.10	.....
February 1, 1900 ...	1.00	.....	.....	1.25	.....
April 2, 1900... ..	1.15	.....	.....	1.30	.....
May 1, 1900.....	1.15	$1.00	.....	1.30	.....
May 15, 1900.....	1.15	1.00	.....	1.25	.....
May 28, 1900.....	1.15	1.00	.....	1.25	.....
October 26, 1900....	1.15	1.00	$1.00	1.25	.....
April 1, 1901.....	1.25	1.00	1.00	1.35	.....
April 3, 1901.....	1.25	1.05	1.05	1.35	.....
April 21, 1902.....	1.25	1.25	1.25	1.35	$1.35
October 2, 1902....	1.25	1.25	1.25	1.35	1.35
January 12, 1903 ...	[A]1.25	[A]1.25	[A]125	[A]1.35	1.35
April 1, 1903 to date, Nov 14, 1903.	[A]1.35	[A]1.35	[A]1.35	[A]1.45	[A]1.45

Rates marked thus * prior to March 8, 1899, local rates. Applicable to Newport News, locally and when destined beyond the Capes.

[1] On Coal for Bunker delivery there will be an additional charge of 75c. per ton of 2,240 pounds for terminal service.

[A] Freight charges to be assessed on basis of actual weights as ascertained by track scales at regular coal weighing points, subject to a minimum of 15 tons per car.

Note.—Prior to March 8, 1899, there were no special rates, on file, applying on coal from New River and Kanawha Districts to Newport News, Va., when destined to points beyond the Capes. Local rates to Newport News, as shown above applied on such traffic prior to date named.

M.S.D.
N.R. TO BE POSTED IN TWO CONSPICUOUS PLACES AT EACH FREIGHT SHIPPING STATION.

AUTHORITY No. 144.
NO CHANGE: Reissue.

C. & O. R'Y FREIGHT TARIFF No. 5375.
SUPERSEDING No. 4906.

FREIGHT TARIFF

— OF THE — 5426

CHESAPEAKE AND OHIO RAILWAY COMPANY

— ON —

COAL AND COKE,

Cancelled by 826 & 827

CAR LOADS, MINIMUM WEIGHT 12 TONS.

Effective

FROM NEW RIVER DISTRICT:

Quinnimont	W. Va.	Cunard	W. Va.	Fire Creek	W. Va.	Cavendish	W. Va.
Prince	"	Brown	"	East Sewell	"	Lookout	"
Alaska	"	Harvey	"	Sewell	"	Nuttall	"
Claremont	"	Red Star	"	Caperton	"	Fayette	"
Beechwood	"	Glen Jean	"	Keeney's Creek	"	Elmo	"
Stone Cliff	"	Dun Loup	"	Boone	"	Sunnyside	"
Thurmond	"	Turkey Knob	"	Ballanger	"	Gaymont	"
Rush Run	"	Macdonald	"	Masters	"	Hawk's Nest	"
Red Ash	"	Beury	"	Dubree	"	Ansted	"
Brooklyn	"	Central	"				

FROM KANAWHA DISTRICT:

Gauley	W. Va.	Montgomery	W. Va.	Black Cat	W. Va.
Deep Water	"	Union Coal Company	"	East Bank	"
Mt. Carbon	"	Con. Mining Co.	"	Coalburg	"
Powellton Junction	"	Handley	"	Ronda	"
Diamond	"	Dego	"	Acme	"
Forrest Hill	"	Paint Creek	"	Cabin Creek	"
St. Clair	"	Gordon's	"	Peerless	"
Eagle	"	Crown Hill	"	Winifrede Junction	"
Edgewater	"	Belmont Coal Co.	"	Spring Hill	"
Crescent	"				

— TO —

LOCAL STATIONS EASTBOUND.

From Gauley Branch Stations—Burdette, Nicholas Road, Belva, Vaughan, Morris, and Greendale, W. Va.—Ten cents per ton higher than Rates from New River District.

ISSUED RICHMOND, VA., SEPTEMBER 24, 1895.

EFFECTIVE OCTOBER 1, 1895.

W. P. WALKER, Jr.,
Freight Traffic Manager.

E. D. HOTCHKISS,
General Freight Agent.

TO		FROM NEW RIVER DISTRICT.			FROM KANAWHA DISTRICT.			
		Coke, PER TON 2,000 lbs.	Steam Coal, PER TON 2,240 lbs.	Fuel Coal, PER TON 2,240 lbs.	Coke, PER TON 2,000 lbs.	Splint Coal, PER TON 2,240 lbs.	Gas Coal, PER TON 2,240 lbs.	Cannel Coal, PER TON 2,000 lbs.
Norfolk	Va.					3.00	3.00	
Portsmouth	"							
Phœbus	"							
Hampton	"							
Newport News	"							
*Old Point Junction	"							
Morrison	"							
*Mellen	"							
Oriana	"							
*Reservoir	"							
Lee Hall	"							
Grove Wharf	"							
Williamsburg	"							
*Jones	"							
*Newman's	"							
Ewell	"							
Kelton	"							
*Vaiden	"							
Toano	"	3.25	2.00	2.00	3.75	2.50	2.50	2.25
Diascund	"							
Lanexa	"							
*Walker's	"							
*Windsor Shades	"							
Providence Forge	"							
Mountcastle	"							
*Nance	"							
Roxbury	"							
*Turner's	"							
Elko	"							
*Clarke's	"							
*Fort Lee	"							
*Gibson	"							
*Fulton Brick Yard	"							
Burton	"							
*Orleans street	"							
Richmond	"							
*Brookland	"							
*Hunslett	"							
Ellerson	"							
Atlee	"							
*Pottomoi	"							
Asbeake	"							
Peake	"							
*Cady	"							
Hanover	"							
*Blanton	"							
*Wickham	"							
*South Anna	"	2.75	2.00	2.00	3.25	2.50	2.50	2.25
*Little River	"							
*Garnett	"							
Doswell	"							
Verdon	"							
*Noel	"							
Hewlett	"							
*Holliday	"							
*Manico	"							
Beaver Dam	"							
Dawson	"							
Bumpass	"							
Buckner	"							
Frederick Hall	"							
Pendleton	"							
Minera[l City	"							
Louisa	"							
*Crank	"	1.88	1.88	1.88	2.15	2.50	2.50	2.25
*Clay Valley	"							
Trevilian	"							
Green Springs	"							
Washington	D. C.		2.25	2.25		3.00		2.75
Melton	Va.							
Gordonsville	"							
Madison	"	1.88	1.88	1.88	2.15	2.50	2.50	2.25
Orange	"							

? No Agent. Freight must be prepaid. * When for export, $2.15.

TO	FROM NEW RIVER DISTRICT.			FROM KANAWHA DISTRICT.			
	Coke, PER TON 2,000 lbs.	Steam Coal, PER TON 2,240 lbs.	Fuel Coal, PER TON 2,240 lbs.	Coke, PER TON 2,000 lbs.	Splint Coal, PER TON 2,240 lbs.	Gas Coal, PER TON 2,240 lbs.	Cannel Coal, PER TON 2,240 lbs.
Lindsay . . . . . Va.							
Cobham . . . . . "							
Campbell . . . . . "							
*Trice's . . . . . "	1.88	1.88	1.88	2.15	2.60	2.50	2.25
Keswick . . . . . "							
Shadwell . . . . . "							
*Massie . . . . . "							
*Moore's Creek . . . . . "							
Charlottesville . . . . . "							
Union Station . . . . . "							
*Wood's . . . . . "							
Ivy . . . . . "							
Meehum's River . . . . . "	1.88	1.70	1.70	2.15	2.25	2.25	2.25
Crozet . . . . . "							
Greenwood . . . . . "							
Afton . . . . . "							
*Blue Ridge . . . . . "							
Basic City . . . . . "							
Waynesboro' . . . . . "							
*Templeton . . . . . "	1.88	1.60	1.60	2.15	2.10	2.10	2.25
Fishersville . . . . . "							
*Brand . . . . . "							
Staunton . . . . . "							
*La Grange . . . . . "	1.88	1.50	1.50	2.15	2.00	2.00	2.10
*Snyder's . . . . . "							
Swoope . . . . . "							
*Christian . . . . . "							
Buffalo Gap . . . . . "							
*North Mountain . . . . . "							
*Chapin . . . . . "							
Ferrol . . . . . "	1.50	1.40	1.40	1.80	1.90	1.80	1.90
Augusta Springs . . . . . "							
*Saffers . . . . . "							
Craigsville . . . . . "							
Bell's Valley . . . . . "							
*Una . . . . . "							
Goshen . . . . . "							
*Panther . . . . . "							
Millboro' . . . . . "							
*Mason's Tunnel . . . . . "							
*Crane . . . . . "							
*Copeland . . . . . "							
*Griffith . . . . . "	‡75	1.00	1.00	1.15	1.20	1.50	1.75
Longdale . . . . . "							
Clifton Forge . . . . . "							
West Clifton Forge . . . . . "							
Low Moor . . . . . "							
*Rich Patch Junction . . . . . "							
*Iron Mountain . . . . . "							
Covington . . . . . "	‡75	1.00	1.00	1.15	1.20	1.20	1.50
*McDowell . . . . . "							
Dunlap . . . . . "							
Backbone . . . . . "							
*Hematite . . . . . "	75	1.00	1.00	1.15	1.20	1.20	1.50
*Jerry's Run . . . . . "							
Alleghany . . . . . "							
Tuckahoe . . . . . W. Va.							
White Sulphur . . . . . "							
*Greenbrier . . . . . "							
*Hart's Run . . . . . "							
Caldwell . . . . . "							
Ronceverte . . . . . "							
*Rockland . . . . . "							
Fort Spring . . . . . "	75	90	90	1.15	1.20	1.10	1.20
*Snow Flake . . . . . "							
*Blue Stone . . . . . "							
*Half-way . . . . . "							
Alderson . . . . . "							
*Mohler . . . . . "							
*Wolf Creek . . . . . "							
Stock Yards . . . . . "	75	75	75	1.15	1.00	90	1.00
Lowell . . . . . "							
Talcott . . . . . "	75	75	75	1.00	1.00	90	1.00
*Pilldale . . . . . "							

* No Agent. Freights must be prepaid. ‡ Also applies on Cannel Nut and Cannel Slack Coal.
† When for pig iron furnaces, 50 cents per ton.

TO	FROM NEW RIVER DISTRICT.			FROM KANAWHA DISTRICT.			
	Coke, PER TON 2,000 lbs.	Steam Coal, PER TON 2,240 lbs.	Fuel Coal, PER TON 2,240 lbs.	Coke, PER TON 2,000 lbs.	Splint Coal, PER TON 2,240 lbs.	Gas Coal, PER TON 2,240 lbs.	Cannel Coal, PER TON 2,240 lbs.
Don, W. Va.							
Hinton, "							
*Tug Creek, "	75	75	75	1.00	1.00	90	1.00
Brooks, "							
Sandstone, "							
Meadow Creek, "							
JAMES RIVER DIVISION.							
Richmond, Va.							
*Haxall, "							
*Water-Works, "							
*Korah, "							
*Westham, "							
Lorraine, "							
*Tuckahoe, "							
Vinita, "							
*Manakin, "							
*Harris, "							
*Boscobel, "	2.75	2.00	2.00	3.25	2.50	2.50	2.25
Stanard, "							
Lee, "							
*State Farm, "							
*Thorncliff, "							
Maiden's, "							
Irwin, "							
*Bolling Hall, "							
Rock Castle, "							
West View, "							
Stokes, "							
Pemberton, "							
*Sand Pit, "							
*Howard's Neck, "							
Elk Hill, "							
Island, "							
Columbia, "							
*Rivanna, "							
Boswell, "							
Bremo, "	2.75	2.00	2.00	3.25	2.50	2.50	2.25
Middleton, "							
Hardware, "							
Payne's, "							
*Nicholas, "							
Scottville, "							
Brown's, "							
Warren, "							
*McCulloch, "							
Howardsville, "							
Highland, "	2.75	2.00	2.00	3.15	2.50	2.50	2.25
Manteo, "							
*Warminster, "							
Midway, "							
Wingina, "							
Norwood, "							
Buffalo Springs, "							
*Greenway, "	2.65	2.00	2.00	3.05	2.50	2.50	2.25
Bolton, "							
Gladstone, "							
*Allen's Creek, "							
*Riverville, "							
Walker's Ford, "							
Stapleton, "							
Galtville, "							
*Mt. Athos, "							
*Six-Mile Bridge, "	2.55	2.00	2.00	2.95	2.50	2.50	2.25
*Kelley's, "							
*Tyree, "							
*Brick Yard, "							
Lynchburg, "	1.25	2.00	2.00	2.85	2.45	2.50	2.25
*Smith's Lock, "							
*Rousens, "							
Bethel, "	1.12	2.00	2.00	2.75	2.40	2.50	2.25
*Holcomb Rock, "							
Pedlar, "							

* No Agent. Freight must be prepa

TO	FROM NEW RIVER DISTRICT.			FROM KANAWHA DISTRICT.			
	Coke, PER TON 2,000 lbs.	Steam Coal, PER TON 2,240 lbs.	Fuel Coal, PER TON 2,240 lbs.	Coke, PER TON 2,000 lbs.	Splint Coal, PER TON 2,240 lbs.	Gas Coal, PER TON 2,240 lbs.	Cannel Coal, PER TON 2,240 lbs.
JAMES RIVER DIVISION.—Con.							
Coleman's . . . . . Va. *Waugh's. . . . . " Big Island. . . . . " *Major . . . . . "	1.12	2.00	2.00	2.65	2.20	2.50	2.25
*Snowdon . . . . . " Balcony Falls . . . . . " Glasgow. . . . . "	1.12	2.00	2.00	2.55	2.20	2.50	2.25
*Locher's Quarry. . . . . " West End . . . . . " Gilmore . . . . . " *Alpine . . . . . " Indian Rock. . . . . " *Dillon . . . . . "	1.12	1.90	1.90	2.45	2.10	2.40	2.25
Buchanan . . . . . " Penn . . . . . " Springwood . . . . . " *Little Tunnel . . . . . " *Catawba . . . . . "	1.12	1.90	1.90	2.35	2.10	2.40	2.25
*Saltpetre . . . . . " *Burks . . . . . " *Salisbury . . . . . "	1.12	1.80	1.80	2.30	2.00	2.30	2.25
Eagle Mountain . . . . . " Bessemer . . . . . "	1.12	1.80	1.80	2.15	2.00	2.30	2.25
Cala Water . . . . . " *Pig Hill . . . . . " *Price's Bluff. . . . . " *Haden . . . . . "	1.12	1.40	1.80	2.15	2.00	2.30	2.25
*Baldwin. . . . . "	1.12	1.40	1 80	2.00	2.00	2.30	2.25
Glen Wilton. . . . . " Lick Run . . . . . " Iron Gate . . . . . " *So. Clifton Forge . . . . . "	‡75	1.25	1.25	2.00	1.45	1.45	2.25
LEXINGTON BRANCH.							
Miller's . . . . . Va. *West Miller's . . . . . " *N. & W. Junction . . . . . " *Loch Laird . . . . . " Buena Vista. . . . . "	‡1.50	2.00	2.25	1.75	2.50	2.25	2.50
*Appold's. . . . . " *Paper Mill. . . . . " *Stratton's . . . . . " *South River . . . . . " E. Lexington . . . . . " Lexington. . . . . "	1.50	2.00	1 75	1.75	2.00	2.50	2.50
BUCKINGHAM R. R. BRANCH.							
*New Canton . . . . . Va. *Dutch Gap . . . . . " Arvonia . . . . . "	3.15	2.40	2.40	3.65	2.90	2.90	2.65
*Penlan . . . . . " *Williams . . . . . " Johnson's . . . . . " *Alpha . . . . . " *Newton . . . . . " White Hall . . . . . " *Dillwyn . . . . . " *Smith's . . . . . " *Hubbard . . . . . " *Rosney . . . . . "	3.35	2.60	2.60	3.85	3.10	3.10	2.85
WARM SPRINGS VALLEY BRANCH.							
*Damron . . . . . Va. *Falling Springs . . . . . " *Natural . . . . . " *Cedar Creek . . . . . " *Kincaid . . . . . "	1.75	2.00	2.00	2.15	2.20	2.20	2.50

TO	FROM NEW RIVER DISTRICT.			FROM KANAWHA DISTRICT.			
	Coke, PER TON 2,000 lbs.	Steam Coal, PER TON 2,240 lbs.	Fuel Coal, PER TON 2,240 lbs.	Coke, PER TON 2,000 lbs.	Splint Coal, PER TON 2,240 lbs.	Gas Coal, PER TON 2,240 lbs.	Cannel Coal, PER TON 2,240 lbs.
WARM SPRINGS VALLEY BRANCH. Continued.							
*Callison . . . . . Va. *Groce . . . . . " Hot Springs . . . . . "	1.75	2.00	2.00	2.15	2.20	2.20	2.50
CRAIG VALLEY BRANCH.							
*Whitten's . . . . . Va. *Horton . . . . . " *Roaring Run . . . . . " *Lemons . . . . . " *Surber . . . . . " *Oriskany . . . . . " *Dickinson . . . . . " *Given . . . . . " *Barbour's Creek . . . . . " *Ripley Springs . . . . . " Craig City . . . . . "	1.25	2.00	2.00	2.35	2.20	2.55	2.45

*No Agent. Freight must be prepaid.

TO BE POSTED IN TWO CONSPICUOUS PLACES AT EACH FREIGHT-SHIPPING STATION

AUTHORITY No. 3283.
CHANGE:
REDUCTION.

C. & O. R'Y FREIGHT TARIFF No. 7964,

Superseding Nos. 5351 and 5375.

I. C. C. No. 828,

Superseding No. 227.

FREIGHT TARIFF

OF THE

CHESAPEAKE AND OHIO RAILWAY COMPANY

cancelled I.C.C-1247 EASTBOUND

12/25/99

ON

NEW RIVER COAL—Car Loads,

MINIMUM WEIGHT TWELVE TONS.

FROM NEW RIVER DISTRICT.

MAIN LINE.	MAIN LINE—Con.	Loop Cross Branch.	South Side Branch.	Keeney's Creek Branch.
Quinnimont, W. Va.	Bury, W. Va.	(Intersecting at Thurmond, W. Va.)	(Intersecting at Thurmond, W. Va.)	(Intersecting at Hinton, W. Va.)
Prince, "	Central, "			
McKendree, "	Fire Creek, "	So. Thurmond, W. Va.	Thurmond Mine, W. Va.	Hinton, W. Va.
Slatey, "	East Sewell, "	Harvey, "	Rend Run Mine, "	Ballengee, "
Buffalo, "	Sewell, "	Red Star, "	Red Ash Mine, "	Meadow, "
Alaska, "	Caperton, "	Glen Jean, "	Brooklyn Mine, "	Dolan, "
Claremont, "	Kenney's Creek, "	Collinsville, "	Thurmond Mine, "	Carpenter, "
Beechwood, "	Nuttall, "	Dun Lane, "	Brown Mine, "	Loudon, "
Stone Cliff, "	Pax Mills, "	Turkey Knob, "		
Riverview, "	Eisen, "	Macdonald, "		
Thurmond, "	Sunnyside, "			
Thurmond, "	Dayron, "			
Rend Run, "	Hawk's Nest, "			
				Hawk's Nest Branch. (Intersecting at Keeney's Creek, W. Va.)
				Ansted, W. Va.

Run of Mine, KANAWHA COAL, Car Loads,

cancelled I.C.C-988 & 1128

MINIMUM WEIGHT TWELVE TONS.

5/1/99

FROM KANAWHA DISTRICT.

MAIN LINE.	Main Line—Con.	Main Line—Con.	Main Line—Con.	Otter Creek Branch.	GAULEY BRANCH.
Gauley, W. Va.	Forrest Hill, W. Va.	Consolidated, W. Va.	Black Cat W. Va.	(Intersecting at Coalburg, W. Va.)	(Intersecting at Cotiga, W. Va.)
Kanawha Falls, "	St. Clair, "	Handley, "	East Bank, "	Dry Branch, W. Va.	K. & M. Jct., W. Va.
Deep Water, "	Eagle, "	Dego, "	Coalburg, "	Borda, "	Burdette, "
Digby, "	Edgewater, "	Paint Creek, "	Wolfpen Junction, "	Fairfield, "	Nicholas Road, "
Mt. Carbon, "	Crescent, "	Gordon's "	Brownstown, "	Cane Fork, "	Helvetia, "
Powelton, "	Montgomery, "	Crown Hill "	Spring Hill, "	Alum Lick, "	Vaughan, "
Diamond, "	Union, "	Belmont, "		Leewood, "	Marvin, "
				Acme, "	Greendale, "

TO

STATIONS ON CHESAPEAKE & OHIO RAILWAY, EASTBOUND.

RATES PER TON OF 2240 POUNDS.

For rates on Domestic Coal, see Tariff No. 7965, I.C.C. No. 827

Issued Cincinnati, O., December 27, 1898. Effective January 2, 1899.

G. W. BENJAMIN,
General Coal Freight Agent, C. & O. Ry.,
Cincinnati, O.

Issued by
JNO. F. ORNDORFF,
Asst General Freight Agent, C. & O. Ry.,
Cincinnati, O.

500

TO	FROM New River District.	FROM Kanawha District.
MAIN LINE, Peninsula Div.		
Norfolk ..... Va		
Portsmouth ..... "		
Fort Monroe ... "		
Phœbus ..... "	1 55	1 70
Hampton ..... "		
*Freemans ..... "		
†Newport News.. "		
*Old Point Jct.. "		
Morrison ..... "		
*Mellen ..... "		
*Menchville ..... "		
Oriana ..... "		
*Reservoir ..... "		
Lee Hall ..... "		
*Booth ..... "		
Grove ..... "		
Williamsburg... "		
*Jones ..... "		
*Newman's ..... "		
Ewell ..... "		
Lightfoot ..... "	1 85	2 00
*Vaiden's ..... "		
Toano ..... "		
Diascund ..... "		
Laneva ..... "		
Walker's ..... "		
*Windsor Shades "		
Providence Forge"		
*Mountcastle ..... "		
*Nance ..... "		
Roxbury ..... "		
*Turner's ..... "		
Elko ..... "		
*Poplar Springs.. "		
*Fort Lee ..... "		
*Gibson ..... "		
*Fulton Brick Yd. "		
*Burton ..... "	1 50	1 65
*Fulton ..... "		
Richmond, prop. "		
RICHMOND DIVISION.		
*Bevins ..... Va		
*Brookland ..... "		
*Strawberry Hill "		
*Hunsleit ..... "		
Ellerson ..... "		
Atlee ..... "		
*Puttomoi ..... "		
Ashcake ..... "	1 75	1 90
Peake ..... "		
*Cady ..... "		
Hanover ..... "		
*Blanton ..... "		
*Wickham ..... "		
*Little River .... "		
*Cresent ..... "		
Doswell { proper...	1 75	1 90
Doswell { beyond	1 35	1 50
Verdon ..... "		
*Noel ..... "		
Hewlett ..... "		
*Holliday ..... "		
*Mattico ..... "		
Beaver Dam ... "	1 75	1 90
Lyles ..... "		
Bumpers ..... "		
Bockets ..... "		
*Frederick's Hall "		
Pendleton ..... "		

TO	FROM New River District.	FROM Kanawha District.
RICHMOND DIV.—Con.		
Mineral ..... Va		
Louisa ..... "		
*Crank ..... "		
Trevilian's ..... "	1 75	1 90
Green Spring... "		
Melton ..... "		
Gordonsville.... "		
Madison ..... "		
Orange ..... "	1 50	1 65
Lindsay ..... "		
Cobham ..... "	1 75	1 90
Campbell ..... "		
*Rugby ..... "		
Keswick ..... "		
Shadwell ..... "	1 75	1 90
*Masale ..... "		
*Moore's Creek.. "		
Charlottesville)	1 25	1 40
Union Station.)		
*Woods ..... "		
Ivy ..... "		
Mechum's River	1 70	1 95
Crozet ..... "		
Greenwood ..... "		
Afton ..... "		
Basic ..... "		
Waynesboro .... "	1 60	1 75
Fishersville..... "		
*Brand ..... "		
Staunton ..... "	1 25	1 40
*La Grange ..... "		
*Snyder's ..... "		
Swoope ..... "		
*Christian's..... "		
Buffalo Gap..... "		
*North Mountain "	1 40	1 55
*Chapin ..... "		
Petrol..... "		
Augusta Springs "		
Craigsville ..... "		
Bell's Valley.... "		
Goshen ..... "		
*Panther ..... "		
Millboro ..... "		
*Mason's Tunnel "		
*Crane..... "		
*Copeland ..... "		
*Griffith..... "		
Longdale..... "		
Clifton Forge... "		
HUNTINGTON DIVISION.	1 90	1 15
Low Moor..... Va		
*Rich Patch Jct.. "		
Covington..... "		
*McDowell..... "		
Dunlap..... "		
Backbone..... "		
*Jerry's Run..... "		
*East Alleghany "		
Alleghany..... "		
Tuckahoe.... W.Va	90	1 05
White Sulphur.. "		
*Greenbrier ..... "		

TO	FROM New River District.	FROM Kanawha District.
HUNTINGTON DIV.—Con.		
*Harts Run... W.Va		
Caldwell..... "		
Ronceverte ..... "		
*Rockland..... "		
Fort Spring..... "	90	1 05
*Snowflake..... "		
*Half Way..... "		
Alderson..... "		
*Mohler ..... "		
*Wolf Creek..... "		
Stock Yards..... "		
Lowell ..... "		
Talcott..... "		
*Don ..... "	75	90
Hinton ..... "		
*Brooks ..... "		
Sandstone..... "		
Meadow Creek.. "		
Glade ..... "	‡25	‡50
Quinnemont.... "		
Prince ..... "		
*McKendree..... "		
*Slater ..... "		
*Buffalo..... "		
*Alaska..... "		
*Beechwood ..... "		
Stone Cliff ..... "		
Thurmond..... "		
*Dimmock ..... "		
Beury ..... "		
*Central ..... "	‡25	‡50
Fire Creek..... "		
*East Sewell..... "		
Sewell ..... "		
Caperton ..... "		
*Keeney's Creek.. "		
Nuttall..... "		
Fayette..... "		
*Elmo ..... "		
*Sunnyside..... "		
*Gaymont..... "		
Hawk's Nest..... "		
Cotton Hill..... "		
Gauley ..... "		
Kanawha Falls.. "		
Deep Water..... "		
*Digby ..... "		
Mt Carbon ..... "		
*Powellton ..... "		
*Diamond ..... "		
*Forrest Hill..... "		
*St. Clair..... "		
Eagle..... "		
*Edgewater..... "		
*Crescent..... "	‡50	‡25
Montgomery ... "		
*Union..... "		
*Consolidated ... "		
Handley..... "		
*Chesapeake..... "		
Paint Creek..... "		
*Gordon's ..... "		
*Crown Hill..... "		
*Belmont..... "		
*Black Cat ..... "		
East Bank..... "		
Coalburg ..... "		
Winifreda Jct.. "		

*No agent. Freight must be prepa...
†Note.—On coal for bunker deliv... an additional charge of 75 cents per ton 2240 lbs. for terminal service.
‡Minimum charge $5.00 per ca...

TO	FROM New River District.	FROM Kanawha District.
WARM SPRINGS VALLEY RR.		
Intersecting at Covington, Va.		
*Damron ..... Va		
*Falling Springs "		
*Natural Well... "		
*Cedar Creek.... "	1 50	1 65
*Kincaid ..... "		
*Callison ..... "		
*Groce ..... "		
Hot Springs.... "		
JAMES RIVER DIVISION.		
*Haxall ..... Va		
*Water Works .. "		
*Korah ..... "		
*Westham..... "		
Lorraine ..... "		
*Tuckahoe..... "		
Vinita ..... "		
*Harris ..... "		
Boscobel ..... "		
Sabot ..... "		
*Strange ..... "		
Lee ..... "		
*State Farm ..... "		
*Thorncliff..... "		
Malden's ..... "		
Irwin..... "		
*Pleasanton ..... "		
Rock Castle..... "		
West View ..... "		
Stokes ..... "		
Pemberton..... "		
*Sand Pit ..... "	1 75	1 90
*Howard's Neck. "		
Elk Hill..... "		
Island ..... "		
Columbia..... "		
*Rivanna..... "		
Boswell..... "		
Bremo ..... "		
Shores ..... "		
Hardware ..... "		
Payne ..... "		
*Nicholas ..... "		
Scottsville..... "		
Hatton ..... "		
*Drewry ..... "		
Warren ..... "		
*McCullough..... "		
Howardsville... "		
Highland..... "		
Manteo..... "		
Worminster..... "		
Midway ..... "		

TO	FROM New River District.	FROM Kanawha District.
JAMES RIVER DIV.—Con.		
Wingina ..... Va		
Norwood ..... "		
Buffalo Springs. "		
*Gay ..... "		
*Greenway..... "		
*Caskie ..... "		
Gladstone ..... "		
*Allen's Creek... "	1 75	1 90
*Riverville..... "		
Walker's Ford.. "		
Stapleton ..... "		
Galt's Mill..... "		
*Joshua Falls..... "		
*Kellys..... "		
Tyro ..... Va	1 50	1 65
Lynchburg { James River / Canal }	1 50 / 95	1 65 / 1 10
*Rockets ..... Va		
Abert ..... "		
Holcomb's Rock.. "		
Pearch ..... "		
Coleman ..... "		
Waugh..... "		
Big Island..... "		
*Major ..... "		
*Snowden..... "		
Balcony Falls... "		
Glasgow..... "		
*Locher's..... "		
Greenlee ..... "		
*Natural Bridge.. "		
Gilmore Mills... "		
*Alpine ..... "		
Indian Rock..... "	1 40	1 55
*Dillon..... "		
Buchanan ..... "		
Springwood..... "		
*Saltpetre ..... "		
*Burke ..... "		
*Salisbury ..... "		
Eagle Mountain "		
Bessemer ..... "		
Gala ..... "		
*Big Hill..... "		
*Price's Bluff.... "		
*Haden's ..... "		
*Baldwin ..... "		
Glen Wilton.... "		
Lick Run..... "		
Iron Gate..... "		

TO	FROM New River District.	FROM Kanawha District.
LEXINGTON BRANCH.		
Intersecting at Balcony Falls, Va.		
Miller's ..... Va		
*West Miller's... "		
*M. & W. Junc... "	1 55	1 65
*Loch Laird..... "		
Buena Vista ..... "	1 30	1 45
*Scottsville ..... "		
*South River .... "		
East Lexington.. "	1 50	1 65
Lexington ..... "		
RICHMOND & W. POINT.		
Intersecting at Manchester, Va.		
*New Castle... Va		
*Dutch Gap..... "	2 00	2 15
Arvonia ..... "		
Fenton ..... "		
*Williams ..... "		
Johnson ..... "		
*Alpha..... "		
*Newton ..... "	2 25	2 40
White Hall..... "		
*Dillwyn ..... "		
*Smith's ..... "		
*Selling ..... "		
*Ramey ..... "		
MIDDLE R. R.		
Intersecting at Warren, Va.		
Earnest..... Va		
*Cole..... "	2 00	2 15
Alberene..... "		
SAN VERA BRANCH.		
Intersecting at Rosney, Va.		
*Wingina..... Va		
*Shells..... "		
*Norton..... "		
*Pine..... "		
*Lucania..... "	1 90	2 05
Ortskany..... "		
*Dickinson..... "		
*Barbour's Creek "		
New Castle..... "		

* No Agent. Freight must be prepaid.

AN ACT to prevent railroad companies from buying and selling coal or coke, and to prevent discriminations.

[Passed February 15, 1895.]

Be it enacted by the Legislature of West Virginia:

1. It shall be unlawful for any railroad corporation to engage, directly or indirectly, in the business of buying and selling coal or coke, or to promise, pledge or lend its credit, money or other property or thing of value to another, either natural or corporate, engaged in such business, but nothing herein shall prevent such corporation from purchasing such articles for its own consumption, or when it is the owner of any such commodities from selling and shipping the same; Provided, in doing so, such corporation shall not discriminate in rates, distribution of cars or otherwise against other shippers of like commodities on its lines; and, provided further, that when such company has the right to sell either of such commodities, and is unable from any cause to fill any bona fide contracts it may have made to supply such commodities, or either of them, it may purchase them to enable it to fill such contracts.

2. Every railroad corporation along whose line of railroad the industries of mining coal or manufacturing coke is carried on, shall without discrimination between or amongst shippers, and without unnecessary delay, make a reasonable provision for the transportation of all such coal and coke offered for transportation over its railroad, and no such railroad corporation shall discriminate in rates, distribution of cars or otherwise against or among shippers of coal or coke offered for shipment on its line or lines.

3. The circuit and criminal courts of every county through or into which the railroad of any such railroad corporation violating any or either of the provisions of this act may pass, shall have concurrent jurisdiction of all the offences under and violations of the provisions of this act.

4. Any railroad corporation or officer or agent thereof who

shall knowingly and wilfully violate any of the provisions of this act, shall for each and every such offense, be deemed guilty of a misdemeanor, and upon indictment and conviction thereof, shall be fined not less than fifty nor more than five hundred dollars.

State of West Virginia.

Certificate.

I, Wm. M. O. Dawson, Secretary of State of the State of West Virginia, do hereby certify that the foregoing writing is a true, full and correct copy of An Act passed by the Legislature of West Virginia, February 15, 1895, entitled, "An Act to prevent railroad companies from buying and selling coal or coke, and to prevent discriminations."

Given under my hand and the great seal of the said State, at the city of Charleston, this fifteenth day of October, 1903.

WM. M. O. DAWSON,
Secretary of State.

State of Virginia,
City of Richmond, } ss.

L. F. Sullivan being duly sworn deposes and says as follows: That he is the Comptroller of the Chesapeake and Ohio Railway Company, in charge of its accounts, and has been such Comptroller since November 15, 1897; that the C. & O. Coal and Coke Company, of which C. J. Wittenberg is President, has not rendered to the Chesapeake and Ohio Railway Company any account of sales or other statement of the coal delivered by it in the months of May, June and July, 1903, to the New York, New Haven and Hartford Railroad Company; that all deliveries of said coal were immediately suspended by the direction of the President of the Chesapeake and Ohio Railway Company after the hearing before the Interstate Commerce Commission on July 3, 1903, except that 4,309 tons, then in transit, were de-

livered on July 6, 1903, and that no statements have been rendered or settlements made by the said C. & O. Coal and Coke Company for or on account of said coal.

This affiant further says that when he was instructed to make up the statement dated the 6th day of November, 1903, and filed in the case of the Interstate Commerce Commission v. the Chesapeake and Ohio Railway Company and the New York, New Haven and Hartford Railroad Company, headed "statement of coal delivered to New York, New Haven and Hartford R. R. Co. and cost thereof, including charges for delivery under contract effective July 1, 1897," he was informed by the Counsel of the Chesapeake and Ohio Railway Company that the Counsel for the Interstate Commerce Commission had requested that there should be included in said statement the tonnage for May, June and July, 1903, and that not having the vessel freight and lighterage, cost of discharging, and insurance, in consequence of not having received any statement or account from the C. & O. Coal and Coke Company as hereinabove set forth, and which was necessary in order to complete said statement, he, the said affiant, sent to the office of the said C. & O. Coal and Coke Company, in the City of New York, and obtained therefrom the figures for the said months of May, June and July, 1903, that appear upon said statements.

L. F. Sullivan.

Subscribed and sworn to before me in my said City of Richmond this 27th day of November, 1903.

Given under my hand and seal this day and year above written.

Columbus A. Canepa,
Notary Public.

My Commission expires on the 17th day of September, 1907.
No stamp required.

State of Virginia.
City of Richmond, } ss.

J. W. Hopkins, being duly sworn deposes and says as follows: That he is the General Agent of the C. & O. Coal Agency Company and has been such agent since about the 1st day of June, 1899; that between January 1, 1899 and June 1, 1899, he was the General Agent of the New River Consolidated Coal Company, and prior thereto he was connected with what was known as the Fuel Department of the Chesapeake and Ohio Railway Company, but that he has had no connection with the Chesapeake and Ohio Railway Company since the 1st day of June, 1899; that acting under instructions of Mr. M. E. Ingalls, President of the Chesapeake and Ohio Railway Company, he made the contract of December 11, 1896, with J. L. Beury, the Laurel Creek Coal and Coke Company and the Greenwood Coal and Coke Company for coal to supply the tonnage called for by the contract of December 3, 1896, between the Chesapeake and Ohio Railway Company and the New York, New Haven and Hartford Railroad Company; that this contract with the New York, New Haven and Hartford Railroad Company was not a secret transaction, but was widely known from the beginning to all of the coal operators in the New River and Kanawha Districts; that said contract was considered an exceedingly beneficial one, both to the railway company and the territory served by it and worked no discrimination or disadvantage against either the New River or the Kanawha District, or any coal operator or shipper of coal in either of said districts; that when the said contract was made with the New York, New Haven and Hartford Railroad Company the C. & O. Coal Agency Company was the sole shipper of coal destined beyond the capes from the New River and Kanawha Districts, and as such shipper handled all the coal destined beyond the capes shipped from said districts until about April, 1900, and was the sole handler of all coal delivered under the contract with the New York, New Haven and Hartford Railroad Company until June 7, 1902, when

deliveries under said contract were suspended in consequence of the coal miners strike; that this suspension of shipments caused a shortage undelivered on said New Haven contract, at the date of its expiration, July 1, 1902, of about sixty thousand tons; that in the Spring of 1903, the President of the Chesapeake and Ohio Railway Company requested the New River operators to complete the delivery of this sixty thousand tons shortage as aforesaid on said contract, but I understand they declined; that the said President of the Chesapeake and Ohio Railway Company then proposed to the C. & O. Coal Agency Company, of which this affiant was, and is, the General Agent, as aforesaid, to complete the delivery of this sixty thousand tons in Kanawha coal, but the said C. & O. Coal Agency Company was not able to accept this proposal because it did not handle a sufficient output of Kanawha coal to enable it to do so after supplying its existing contracts, and that thereupon, I understand, an arangement was made by the Chesapeake and Ohio Railway Company with the Kanawha Fuel Company to furnish this sixty thousand tons shortage on said New Haven contract as aforesaid; that the delivery of this sixty thousand tons of coal by the Kanawha Fuel Company, to the best of my knowledge and belief, worked no discrimination or disadvantage whatever against either the Kanawha or New River Districts, or against any shipper of coal in either district, and the fact that the said Kanawha Fuel Company had undertaken to supply this sixty thousand tons of coal was well known to all coal operators and shippers in both of said districts.

This affiant further says that he is acquainted with W. C. Bullitt, who is a member of the firm of Castner, Curran and Bullitt, which firm is the principal shipper of coal from the Pocahontas fields on the line of the Norfolk and Western Railroad, and is a rival in the shipment of coal of the C. & O. Coal Agency Company; that he has read what purports to be the affidavit of the said W. C. Bullitt, dated November 13, 1903, and filed in the case of the Interstate Commerce Commission v. the Chesapeake and Ohio Railway Company and the New York, New Haven and Hartford Railroad Company, in the United

States Circuit Court at Lynchburg, which affidavit is as follows:

"That in the month of June, 1903, he applied to J. W. Hopkins of Richmond, Virginia, for a price on Kanawha coal; that said Hopkins is, and for many years has been, a large handler of coal from the line of the Chesapeake and Ohio Railway Company; that in reply to his inquiry said Hopkins offered to sell to him for shipment to Newport News and beyond the capes such quantity of Kanawha coal as said affiant might wish to buy, not to exceed, however, one thousand (1,000) tons per day; that the price named by said Hopkins was satisfactory to said affiant had he been able to secure the reduction in freight rate which he thereupon applied for to the Chesapeake and Ohio Railway Company."

That in the spring and summer of 1903, he had several conversations with the said Bullitt, as was usual when they happened to meet, or met by appointment, or conversed by telephone, in regard to the coal market conditions and prices of coal; that he may have said in such conversations that Kanawha and Norfolk and Western coal was being offered at attractive prices, and he may have said that he could sell Kanawha coal at a figure which was satisfactory, but he did not offer to sell the said Bullitt "for shipment to Newport News and beyond the capes such quantity of Kanawha coal as he might wish to buy, not to exceed one thousand (1,000) tons per day," or in any other quantity; that he would have undoubtedly quoted the said Bullitt prices on coal if he had asked for them, and would have been glad to have made a sale of coal to him, but he did not entertain the idea, if a quotation was asked for by said Bullitt, that it was for the purpose of making an actual purchase, or that anything he may have said in regard to prices of coal had been construed by the said Bullitt as an offer for an actual sale; that he has never sold Kanawha coal to the said Bullitt, or his firm, or been asked for prices on said coal with the understanding that the said Bullitt contemplated becoming a purchaser.

J. W. Hopkins.

Subscribed and sworn to before me this the 27th day of November, 1903.

Given under my hand and official seal this the day and year above named.

A. J. T. TREVVETT.
Notary Public.

My Commission expires February 18, 1905.
No stamp required.

State of Virginia,
City of Richmond, } ss.

E. D. Hotchkiss, being first duly sworn deposes and says that he is the General Freight Agent of the Chesapeake and Ohio Railway Company as set out in a previous affidavit made by him and heretofore filed in the case of the Interstate Commerce Commission against the Chesapeake and Ohio Railway Company and the New York, New Haven and Hartford Railroad Company, in the United States Circuit Court at Lynchburg; that on or about the 12th day of April, 1895, he caused to be published through freight tariff No. 5177, dated April 10, 1895, an original of which has been heretofore filed in the above entitled case; that he caused printed copies thereof to be duly delivered to L. S. Macon, who, at that time was the mailing clerk employed in the office of the said E. D. Hotchkiss, with instructions to mail in accordance with the usual mailing list for such coal tariffs, and that the records in his office show that the said Macon did on the 12th day of April, 1895, receive and send out said Through Freight Tariff No. 5177, and that the records further show that a copy was on that day mailed to Mr. C. C. McCain, then Auditor of the Interstate Commission at Washington, D. C. Affiant further says that he has read the affidavit of Mr. J. M. Smith, Auditor of the Interstate Commerce Commission, dated November 14, 1903, and filed by the complainant in the above entitled case. Affiant further says that said

Through Freight Tariff No. 5177, and the Tariff entitled: Chesapeake and Ohio Railway. Joint Freight Tariff No. 7967. Superseding No. 5177 "being I. C. C. No. 829, effective January 2, 1899, and tariff headed: Chesapeake and Ohio Railway. Joint Freight Tariff No. 7994. Superseding No. 7967," being I. C. C. No. 845, effective January 3, 1899, and remaining in effect until the 8th day of March 1899, show the tariff rates applicable upon coal shipped from the New River or Kanawha Districts of West Virginia to New Haven or points in New England, notwithstanding the fact that the said tariffs appear to be to New York, N. Y. Affiant further says that the three tariffs last above named show the rates under which the coal was delivered to the New York, New Haven and Hartford Railroad Company; that said tariffs show upon their face that they were operative "From mines to Newport News and in cargo quantities by vessel from Newport News to destination, subject to ocean contracts and charters," and while the said tariff sheets show on the face thereof "to New York, N. Y.," yet there being only one shipper of coal beyond the capes, as explained in the previous affidavit of this affiant, the said rates nevertheless applied to coal shipped to New England points if the destination of said coal should be changed by the shipper to said points prior to the sailing of the vessel from Newport News.

Affiant further says that C. & O. Ry. Freight tariff on coal and coke No. 5375, I. C. C. No. 227, did not apply to the transportation by the Chesapeake and Ohio Railway to Newport News on coal shipped from the New River and Kanawha Districts to New Haven and other New England points, but as shown upon its face, was the local tariff in effect and applicable on domestic shipments, and that the rate of $2.00 to Newport News was the local domestic rate on New River steam coal per ton of 2240 pounds and should not be added to the prevailing ocean rate to New Haven and other New England points to arrive at the through rate on coal destined beyond the capes.

Affiant further says that C. & O. Ry. Freight Tariff No. 7964, surperseding No. 5375, being I. C. C. No. 826, supersed-

ing No. 227, in like manner shows the local domestic rate of $1.55 from the New River District to Newport News per ton of 2240 pounds, and said rate of $1.55 should not be added to the prevailing ocean rate to New Haven and other New England points in order to arrive at the through rate on coal destined beyond the capes. Affiant hereto attaches a copy of C. & O. Ry. Tariff No. 7965, also superseding No. 5375, being I. C. C. No. 827, also superseding No. 227, which shows the rate on domestic splint coal, carload, minimum weight 12 tons, per ton of 2240 pounds from the Kanawha District to Newport News, of $2.25 instead of $1.70 as indicated on I. C. C. No. 826, but it will be noted that the said tariff I. C. C. No. 827 is applicable solely from the Kanawha District.

Furthermore affiant says that the three tariffs No. 5177, No. 7667, superseding No. 5177, being I. C. C. No. 829, and No. 7994, superseding No. 7967, being I. C. C. No. 845, superseding No. 829, are regularly followed by C. & O. Ry. Freight Tariff No. 8155, superseding No. 7994, being I. C. C. No. 911, superseding No. 845, and C. & O. Ry. Freight Tariff No. 8407, superseding No. 8135, being I. C. C. No. 1003, superseding I. C. C. No. 911, and C. & O. Ry. Freight Tariff No. 9179, superseding No. 8407, being I. C. C. No. 1324, superseding No. 1003, and C. & O. Ry. Freight Tariff No. 9231, superseding No. 9179, being I. C. C. No. 1334, superseding No. 1324, and C. & O. Ry. Freight Tariff No. 9322, being I. C. C. No. 1347, and C. & O. Ry. Freight Tariff No. 9647, superseding Nos. 9231 and 9322, being I. C. C. No. 1428, superseding Nos. 1334 and 1347, and C. & O. Ry. Freight Tariff No. 9699, superseding No. 9647, being I. C. C. No. 1454, superseding No. 1428, and C. & O. Ry. Freight Tariff No. 10332, superseding No. 9699, being I. C. C. No. 1726, superseding No. 1454, and C. & O. Ry. Freight Tariff No. 10850, superseding No. 10332, being I. C. C. No. 2200 superseding No. 1726, and C. & O. Ry. Freight Tariff No. 10932, superseding No. 10850, being I. C. C. No. 2286, superseding No. 2200, and C. & O. Ry. Freight Tariff No. 11032, superseding No. 10932, being I. C. C. No. 2374 superseding No.

2286, which carry the rates up to the present time, Tariff No. 11032, I. C. C. No. 2374 being the tariff rates at present in effect.

Affiant further states that all shipments of coal destined beyond the Capes are in cargo quantities; that the tariffs, copies of which are filed with the affidavit aforesaid of the said J. M. Smith, being C. & O. Ry. Freight Tariff No. 5375, I. C. C. No. 227, and C. & O. Ry. Freight Tariff No. 7964, being I. C. C. No. 826 are not for cargo quantities, but show upon their face that they are confined to shipments of coal in carload lots, while C. & O. Ry. Through Freight Tariff No. 5177, and C. & O. Ry. Through Freight Tariff No. 7967, being I. C. C. No. 829, and C. & O. Ry. Joint Freight Tariff No. 7994, being I. C. C. No. 845, show upon their face that they are through rates, and applicable to cargo quantities. All the tariffs above referred to, subsequent to said I. C. C. No. 845, show upon their face "when destined beyond the capes," which is equivalent to shipments of coal in cargo quantities.

Affiant further states that the rates on bituminous coal destined beyond the capes per ton of 2240 pounds from the New River District, as shown by the tariffs filed by the Chesapeake and Ohio Railway Company and hereinbefore referred to are as follows: from April 15, 1895, to and including January 1, 1899, $2.25 per ton of 2240 pounds "Where in carloads—minimum weight 12 tons—from mines to Newport News, Va., and in cargo quantities, by ocean and vessel from Newport News to destination, *subject to ocean contracts and charters as arranged and accepted in advance of shipments*;" that for January 2, 1899 the rate was $2.00 per ton of 2240 pounds "In carloads—Minimum weight 12 tons—from mines to Newport News, Va., and in cargo quantities, by vessel from Newport News to destination, *subject to ocean contracts and charters as arranged and accepted in advance of shipment;* that from and including January 3, 1899 to March 8, 1899 the rate in effect was $1.75 from the mines named on the main line, and $1.80 from the mines named on the Branch lines, per ton of 2240 pounds "From

mines to Newport News, Va., and in cargo quantities by vessel from Newport News to destination, *subject to ocean contract and charters,*" said rates being also "subject to increase or reduction in accordance with prevalent rates under ocean contracts and charters as arranged and accepted in advance of shipment; shipper to have option to make his own ocean contract or charter, in which event the rail proportion of the cost of such through transportation shall be 60 per cent. of the above named rates of $1.75 and $1.80 to New York." Affiant further says that Tariff I. C. C. No. 911, effective March 8, 1899 shows the first rates specifically established to Newport News, applicable upon shipments of coal destined beyond the capes, and the rate from the New River District was as indicated 90 cents, and thereafter said rates have been as follows:

May 13, 1899, to January 17, 1900,	$ .80 cents
January 17, 1900, to February 1, 1900,	$ .85 cents
February 1, 1900, to April 2, 1900,	$1.00
April 2, 1900, to April 1, 1901,	$1.15
April 1, 1901, to April 1, 1903,	$1.25
April 1, 1903, to the present date,	$1.35

and the rate from the Kanwha District from April 1, 1903 to the present date is $1.45 per ton.

E. D. Hotchkiss.

Subscribed and sworn to before me this the 27th day of November 1903.

Given under my hand and official seal this the day and year above named.

Columbus A. Canepa,
Notary Public.

No stamp required.

My Commission expires September 17, 1907.

TO BE POSTED IN TWO CONSPICUOUS PLACES AT EACH FREIGHT-SHIPPING STATION.

Authority No. 3284 CHANGE: REDUCTION.	C. & O. R'y Freight Tariff No. 7965 SUPERSEDING No. 5375.	I. C. C. No. 827 Superseding No. 227

FREIGHT TARIFF

OF THE

CHESAPEAKE AND OHIO RAILWAY COMPANY

EASTBOUND

ON

Domestic Splint Coal--Car Loads

MINIMUM WEIGHT TWELVE TONS, PER TON 2,240 POUNDS.

FROM KANAWHA DISTRICT.

MAIN LINE.		MAIN LINE—Con.		CABIN CREEK BRANCH (Intersecting at Coalburg, W. Va.)	
Gauley,	W. Va.	Consolidated,	W. Va.	Dry Branch,	W. Va.
Kanawha Falls,	"	Handley,	"	Ronda,	"
Deep Water,	"	Dego,	"	Fairfield,	"
Digby,	"	Paint Creek,	"	Cane Fork.	"
Mt. Carbon,	"	Gordon's,	"	Alum Lick,	"
Powellton,	"	Crown Hill,	"	Leewood,	"
Diamond,	"	Belmont,	"	Acme,	"
Forrest Hill,	"	Black Cat,	"		
St. Clair,	"	East Bank,	"	GAULEY BRANCH. (Intersecting at Gauley, W. Va.)	
Eagle,	"	Coalburg,	"		
Edgewater,	"	Winifrede Junction	"	K. & M. Junction,	W. Va.
Crescent,	"	Brownstown,	"	Burdette,	"
Montgomery,	"	Spring Hill,	"	Nicholas Road,	"
Union,	"			Belva,	"
				Vaughan,	"
				Morris,	"
				Greendale,	"

TO

Stations on Chesapeake & Ohio Railway, Eastbound.

Issued Cincinnati, O., December 27, 1898. Effective January 2, 1899.

G. W. BENJAMIN,
General Coal Freight Agt. C. & O. Ry.,
Cincinnati, O.

Issued by
JNO. F. ORNDORFF,
Ass't General Freight Ag. C. & O. Ry.
Cincinnati, O.

[In the original the following is in tabular form :]

MAIN LINE—Peninsula Division.	Rate
To Norfolk, Portsmouth, Fort Monroe, Phœbus, Hampton, *Freemans, Newport News, *Old Point Jct., Morrison, *Mellen, *Menchville, Oriana, *Reservoir, Lee Hall, *Bocth, Grove, Williamsburg, *Jones,*Newman's, Ewell, Lightfoot, *Vaiden's, Toano, Diascund, Lanexa, Walker's, *Windsor Shades, Providence Forge,*Mouncastle,*Nance, Roxbury, *Turner's, Elko, *Poplar Springs, *Fort Lee, *Gibson,*Fulton Brick Yd., *Burton,*Fulton, Richmond, Va.,	2.25
Richmond Division.	
*Belvins, *Brookland, *Strawberry Hill, *Hunslett, Ellerson, Atlee, *Pottomoi, Ashcake, Peake, *Cady, Hanover, *Blanton, *Wickham, *Little River, *Garnett, Doswell, Verdon, *Noel, Hewlett, *Holliday, *Mantico, Beaver Dam, Tylers, Bumpass, Buckner, *Frederick's Hall, Pendleton, Mineral, Louisa, *Crank, Trevilians, Green Springs, Melton, Gordonsville, Madison, Orange, Lindsay's, Cobham, Campbell, Rugby, Keswick, Shadwell, *Massie, *Moore's Creek, Charlottesville, Union Station, *Woods, Ivy, Mechum's River, Crozet, Greenwood, Afton,Va.	2 25
Basic, Waynesboro, Fishersville, *Brand, Va.,	2.10
Staunton, *LaGrange, *Snyder's, Va.,	2.00
Swoope's, *Christian's, Buffalo Gap, *North Mountain, *Chapin, Ferrol, Augusta Springs, Craigsville, Bell's Valley, Va.,	1.90
Goshen, *Panther, Millboro, *Mason's Tunnel, *Crane, *Copeland, *Griffith, Longdale, Clifton Forge, Va.,	1.20
Huntington Division.	
Low Moor, *Rich Patch Junction, Covington, *McDowell, Dunlap, Backbone, *Jerry's Run, *East Alleghany, Alleghany, Va.; Tuckahoe, White Sulphur, *Greenbrier, *Harts Run, Caldwell, Ronceverte, *Rockland, Fort	

To	Rate
Spring, *Snowflake, *Half Way, Alderson, *Mohler, *Wolf Creek, W. Va.	1.20
Stock Yards, Lowell, Talcott, *Don, Hinton, *Brooks, Sandstone, Meadow Creek, W. Va.	1.00

Warm Springs Valley Branch.

(Intersecting at Covington, Va.)

*Dameron, *Falling Springs, *Natural Well, *Cedar Creek, *Kincaid, *Callison, *Groce, Hot Springs, Va. . . .	1.80

James River Division.

*Haxall, *Water Works, *Korah, *Westham, Lorraine, *Tuckahoe, Vinita, *Harris, Boscobel, Sabot, *Strange, Lee, *State Farm, *Thorncliff, Maiden's, Irwin, *Pleasanton, Rock Castle, West View, Stokes, Pemberton, *Sand Pit, *Howard's Neck, Elk Hill, Island, Columbia, *Rivanna, Boswell, Bremo, Shores, Hardware, Payne, *Nicholas, Scottsville, Hatton, *Drewry, Warren, *McCullough, Howardsville, Highland, Manteo, Warminster, Midway, Wingina, Norwood, Buffalo Springs, *Gay, *Greenway, *Caskie, Gladstone, *Allen's Creek, *Riverville, Walker's Ford, Stapleton, Galt's Mill, *Joshua Falls, *Kelley's, Tyree, Lynchburg, *Reusen's, Abert, Holcomb Rock, Pearch, Va., ...	2.25
Coleman, Waughs, Big Island, *Major, *Snowden. . .	2.20
Balcony Falls, Glasgow, *Locher's, Greenlee, *Natural Bridge, Gilmore Mills, *Alpine, Indian Rock, *Dillon, Buchanan, Springwood, *Saltpetre, *Burke, *Salisbury, Eagle Mountain, Bessemer, Gala, *Big Hill, *Price's Bluff *Haden's, *Baldwin, Va.	2.00
Glen Wilton, Lick Run, Iron Gate, Va.	1.00

Lexington Branch.

(Intersecting at Balcony Falls, Va.)

Miller's, *West Miller's, *N. & W. Junction, *Loch Laird, Buena Vista, *Stratton's, *South River, East Lexington, Lexington, Va., ...	2.00

Buckin ham R. R. Branch.

(Intersecting at Bremo, Va.)

For	Rate
*New Canton, *Dutch Gap, Arvonia, Va.	2.50
Penlan, *Williams, Johnson, *Alpha, *Newton, Whitehall, *Dillwyn, *Smith's, *Bolling, *Rosney, Va. . . .	2.75

Alberene R. R.

(Intersecting at Warren, Va.)

Esmont, *Coles, Alberene	2.50

Craig Valley Branch.

(Intersecting at Bessemer, Va.)

*Whittens, *Stulls, *Horton, *Parr, *Lemons, Oriskany, *Dickinson, *Barbour's Creek, New Castle, Va. . . .	2.20

*No agent. Freight must be prepaid.

State of Pennsylvania, County of York. } ss.

L. S. Macon, being first duly sworn deposes and says: That he is a resident of the City of Pittsburg, State of Pennsylvania; that in April, 1895, he was a resident of the City of Richmond, and employed in the office of E. D. Hotchkiss, General Freight Agent of The Chesapeake and Ohio Railway Company as Mailing Clerk; that he continued in such employment until on or about the 10th day of August, 1895, when he resigned his position with the Chesapeake and Ohio Railway Company to accept service elsewhere; affiant further says that his attention has been called to what purports to be an extract from an affidavit made by Mr. J. M. Smith, Auditor of the Interstate Commerce Commission, which extract reads as follows:

"Affiant says that his attention has been called to a tariff sheet filed by the Chesapeake and Ohio Railway Company in the case of the Interstate Commerce Commission against the Chesapeake and Ohio Railway Company and the New York, New Haven and Hartford Railroad Company, pending in the Circuit Court for the Western District of Virginia, which tariff sheet bears date 'Richmond, Virginia, April 10, 1895' and is 'Through

Freight Tariff No. 5177, rates of transportation taking effect April 15, 1895, via rail to Newport News, Virginia, thence via ocean and vessels, on bituminous coal,' 'from New River District' and 'from Kanawha District' to 'New York, N. Y.' which said tariff sheet is signed by E. D. Hotchkiss, General Freight Agent, and by W. P. Walker, Jr., Freight Traffic Manager. Affiant says that this tariff sheet has not been filed by The Chesapeake and Ohio Railway Company, or any one else, with the Interstate Commerce Commission."

Affiant says that he has procured from the file kept by him in the office of the General Freight Agent of the Chesapeake and Ohio Railway Company at Richmond, Virginia, the original tariff No. 5177 and the original mailing list, which he hereto attaches to this affidavit. Affiant says that the pencil writing thereon, to wit; "Recd. and sent out 4 - 12 - 95" are in his handwriting, and that the check marks on said list headed "Exchange list for joint tariff 5177" were made by him; affiant further says that on said 12th day of April, 1895, he mailed a copy of said tariff No. 5177 to C. C. McCain, and that C. C. McCain was at that time Auditor of the Interstate Commerce Commission at Washington in the District of Columbia; affiant further says that he sent out on the same day three copies of said tariff to each of the C. & O. agents in the New River and Kanawha Districts and Branches and to the C. & O. Agent at Newport News to be posted in accordance with the law. Affiant further says that he sent out the copies as indicated to each of the other parties named in said list headed "Exchange List for joint tariff 5177" on said 12th day of April, 1895.

L. S. Macon.

Subscribed and sworn to before me this 27th day of November, 1903.

Given under my hand and official seal the day and year aforesaid.

B. R. Paxton,
Notary Public.

My Commission expires April 18, 1907.

AUTHORITY NO. 1187

Chesapeake & Ohio Railway Company

TRAFFIC DEPARTMENT

RICHMOND, VA., April 10, 1895.

THROUGH FREIGHT TARIFF

Red and Sec Our A-

NO. 5177

Rates of Transportation, Taking Effect April 15, 1895.

Via Rail to Newport News, Va., thence via Ocean and Vessels.

ON

BITUMINOUS COAL,

Where in Car Loads—Minimum Weight 12 Tons—from Mines to Newport News, Va., and in Cargo Quantities, by Ocean and Vessel from Newport News to Destination, SUBJECT TO OCEAN CONTRACTS AND CHARTERS, AS ARRANGED AND ACCEPTED IN ADVANCE OF SHIPMENTS.

FROM NEW RIVER DISTRICT.

Quinnimont,	W. Va.	Glen Jean,	W. Va.	Masters,	W. Va.
Prince,	"	Dun Loup,	"	Dubree,	"
Alaska,	"	Turkey Knob,	"	Cavendish,	"
Claremont,	"	Macdonald,	"	Lookout,	"
Beechwood,	"	Echo,	"	Nuttall,	"
Stone Cliff	"	Central,	"	Fayette,	"
Thurmond,	"	Fire Creek,	"	Elmo,	"
Rush Run,	"	East Sewell,	"	Sunnyside,	"
Red Ash,	"	Sewell,	"	Gaymont,	"
Brooklyn,	"	Caperton,	"	Hawk's Nest,	"
Cunard,	"	Keeney's Creek,	"	Ansted	"
Harvey,	"	Boone,	"		
Red Star,	"	Ballanger,	"		

To New York, N. Y., $2.25 per Ton 2,240 Pounds.

FROM KANAWHA DISTRICT.

Gauley,	W. Va.	Handley,	W. Va.	Acme,	W. Va.
Deep Water,	"	Chesapeake,	"	Peerless,	"
Mt. Carbon,	"	Kanawha C. C. Co.,	"	Cabin Creek,	"
Powellton Junc.	"	Paint Creek,	"	Winifrede Junc.,	"
Forrest Hill,	"	Gordon's	"	Spring Hill,	"
Eagle,	"	Crown Hill,	"	Burdette,	"
Edgewater,	"	Belmont Coal Co.,	"	Nicholas Road,	"
Crescent,	"	Blacksburg,	"	Belva,	"
Montgomery,	"	East Bank,	"	Vaughan,	"
Union Coal Co.,	"	Coalburg,	"	Morris,	"
Con. Mining Co.,	"	Ronda,	"	Greendale,	"

To New York, N. Y., $2.50 per Ton 2,240 Pounds.

MANIFEST SOLID THROUGH VIA NEWPORT NEWS, VA.

Above Rates do not include Marine Insurance.

W. P. WALKER, JR.,
Freight Traffic Manager.

E. D. HOTCHKISS,
General Freight Agent.

500—3—4—'95.

Agents will receive three copies of this Tariff, two of which must be posted in two conspicuous places for public inspection.

A 1187

EXCHANGE LIST FOR JOINT TARIFF 5177.

Usual List, 17. √
C. C. McCain, 1. √
Agent New River and K. Districts and Branches, 3 each. √
J. W. Hopkins, 3. √
J. H. Lauten, Alaska, W. Va., 1. √
J. F. Jones, Sterling, W. Va., 1. √
O. C. Kubash, Stone Cliff, W. Va., 1. √
F. Howald, Rush Run, W. Va., 1. √
W. H. Holland, Nuttall, W. Va., 1. √
F. Boone, Nuttall, W. Va., 1. √
J. R. Seal, Fire Creek, W. Va., 1. √
J. F. Canvendish, Nuttall, W. Va., 1. √
J. H. Thayer, Thurmond, W. Va., 1. √
Deitz & Mastering, Lansing, W. Va., 1. √
J. A. Boone, Fayette, W. Va., 1. √
G. H. Caperton, Fire Creek, W. Va., 1. √
D. C. Boyce, Quinnimont, W. Va., 1. √
James Kay, Prince, W. Va., 1. √
F. P. Rothwell, Nuttall, W. Va., 1. √
J. D. Campbell, Winona, W. Va., 1. √
D. R. Bishop, Sunny Side, W. Va., 1. √
J. L. Beury, Beury, W. Va., 1. √
J. L. Beury, Beury, W. Va., 1. √
W. A. Burke, Staunton, Va., 1. √
J. Collins, Glen Jean, W. Va., 1. √
F. P. Walker, Dun Loup, W. Va., 1. √
J. B. McGuffin, Sewell, W. Va., 1. √
S. Dixon MacDonald, W. Va., 1. √
George Gones, Red Star, W. Va., 1. √
D. W. Langdon, Turkey, Knob, W. Va., 1. √
S. McDonald, Mt. Carbon, W. Va., 1. √
Evan Powell, Powellton, W. Va., 1. √
Wm. Wyant, Eagle, W. Va., 1. √
Wm. Sharpe, Eagle, W. Va., 1. √

M. T. Davis, Eagle, W. Va., 1. √
Enoch Carver, Edgewater, W. Va., 1. √
W. R. Johnson, Crescent, W. Va., 1. √
J. W. Straughan, Montgomery, W. Va., 1. √
M. T. Davis, Montgomery, W. Va., 1. √
Jno. Carver, Montgomery, W. Va., 1. √
Chas. Trudgen, Montgomery, W. Va., 1. √
J. B. Lewis, Handley, W. Va., 1. √
J. C. Morrison, Crown Hill, W. Va., 1. √
Robt. Ballard, Crown Hill, W. Va., 1. √
Arthur Robinson, Coalburg, W. Va., ? 1. √
S. H. Montgomery, Ronda, W. Va., 1. √
F. L. Garrison, Coalburg, W. Va., 1. √
A. M. Wooldridge, Spring Hill, W. Va., 1. √
C. B. Orcutt, New York, N. Y., 3. √
Newport News, 3. √

State of Virginia,
City of Richmond. } ss.

L. F. Sullivan being duly sworn deposes and says as follows:

That he is the Comptroller of the Chesapeake & Ohio Railway Company, as set out in a previous affidavit made by him and heretofore filed in the case of the Interstate Commerce Commission against the Chesapeake & Ohio Railway Company and the New York, New Haven & Hartford Railroad Company, in the United States Circuit Court at Lynchburg; that the method of keeping the accounts of the C. & O. Ry. Co. for the coal delivered to the New York, New Haven & Hartford Railroad Company, under the contract dated the 3rd day of December, 1896, was as follows: the coal was billed collect at tariff rate from shipping point to the C. & O. Coal Agency Company, New York, up to the 8th day of March, 1899, and thereafter to the C. & O. Coal Agency Company, Newport News, Va. The coal so billed was by said C. & O. Coal Agency Company reconsigned

to the New York, New Haven & Hartford Railroad Company at such point of delivery as was designated by the said New York, New Haven & Hartford Railroad Company, that is to say, New Haven, Providence or Boston, respectively; the amount so billed was charged to the agent at Newport News in his station account; as the vessels were loaded a detailed statement of the coal dumped therein was sent by the agent to the C. & O. Coal Agency Company and a copy was also sent by the agent to the C. & O. Ry. Co., at Richmond, Va.; at the close of each month the agent rendered a summary headed: "Accounts to Auditor for collection," showing thereon number of cargo, date shipped, name of vessel, tonnage, freight and advances to the ship; upon receipt of this statement from the agent at Newport News, after verification, a statement was made up and sent by the C. & O. Ry. Co. to the C. & O. Coal Agency Company detailing the cargoes by numbers shipped to them during the month, on which they inserted opposite each number the approximate net proceeds and returned the same to the C. & O. Ry. Co. This amount was charged on the books of the C. & O. Ry. Co. against the C. & O. Coal Agency Company and the difference between the amount so charged and the amount rendered by the agent at Newport News in his statement of "Accounts to Auditor for collection," was charged on the said books of the C. & O. Ry. Co. to an account headed "Adjustment Account," the same being a fund arbitrarily deducted from time to time from earnings and placed to a credit account to provide for the payment of the loss to the railway company resulting from the performance of the contract with New York, New Haven & Hartford Railroad Company; the sum total of the debit to the C. & O. Coal Agency Company and the "Adjustment Account" was credited to the agent at Newport News in his station account, relieving the agent from the amount charged against him as above set out; accounts of sales were rendered by the C. & O. Coal Agency Company from time to time, as soon as practicable, after delivery of the coal to the New York, New Haven & Hartford Railroad Company, in which accounts were shown the settlements made

by the C. & O. Coal Agency Company with the New York, New Haven & Hartford Railroad Company for the coal, and the charges for the delivery thereof, and also under the head of "Water freight" the loss to the railway company under its tariff rate, which loss was caused partly by the excess cost of the coal beyond the price of seventy cents named in the contract dated December 11, 1896, between J. W. Hopkins, of the first part, the Greenwood Coal and Coke Company, and the Laurel Creek Coal and Coke Company and J. L. Beury, parties of the second part, but principally by the excess cost of the vessel freight beyond the prices of fifty cents and sixty cents, respectively, named in the contract dated December 31, 1897, between the Atlantic Transportation Company and the Chesapeake & Ohio Railway Company; upon receipt of the Accounts of sales above named a final adjustment was made as between the approximations previously stated and the actual figures as shown by the accounts of sales, respectively, the difference being debited or credited to the C. & O. Coal Agency Company or the said "Adjustment Account," as the case might be; the item "Water freight" does not appear on the books of the C. & O. Ry. Co. but the amount thereof is included in the "Adjustment Account" above described.

L. F. Sullivan.

Subscribed and sworn to before me this 28th day of November, 1903.

Given under my hand and official seal the day and year above named.

A. J. T. Trevvett,
Notary Public.

(Seal.)

My commission expires February 18, 1905.

Copy.

Contract made between the Chesapeake & Ohio R'y , Co. of

and The New York, New Haven and Hartford Railroad Company.

Said Chesapeake & Ohio Railway Co for the consideration hereinafter mentioned hereby agrees to furnish to said Railroad Company not to exceed two million gross tons of bituminous coal from its line in such quantities monthly as wanted from July 1, 1897, to July 1st, 1902, without charge for demurrage. Deliveries to be made not exceeding four hundred thousand tons per annum.

And said Chesapeake & Ohio Railway Company further agrees that all said Bituminous Coal shall be of the best quality first-class in every respect, and satisfactory to said Railroad Company and said Railway Company has the right to terminate this contract at any time if said bituminous coal be of poor quality, or if its delivery be unnecessarily delayed.

And said Chesapeake & Ohio Railway Company further agrees to deliver all said bituminous coal to said Railroad Company in its bins at such ports upon its line as required by the monthly requisitions of its Purchasing Agent.

In consideration of the faithful performance by the said Chesapeake & Ohio R'y. Co of all its agreements herein contained, said Railroad Company agrees to pay for said bituminous coal at the rate of two and seventy five one hundredths dollars per gross ton New Haven basis. settlement to be made Monthly

Said Railway Co. has the right to cancel any and all portions of said quantity of bituminous coal remaining undelivered on July 1st, 1902.

~~are not to be responsible for detentions in deliveries occasioned by strikes of their workmen, or destruction of or damage to their works by fire, or the elements, or any cause beyond their control.~~

for value received, hereby guarantee that the Chesapeake & Ohio R'y. Co. shall not fail to deliver coal on account of strikes.

Witness the names of the parties hereto this the Third day of Dec. 1897

(Signed) Chesapeake & Ohio Ry Co

By M Kahn Pres

(Signed) THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY

By C E Mellen

Second Vice President

191 And at another day, to wit:

At a term of the circuit court of the United States for the western district of Virginia, continued and held at Lynchburg, on Tuesday, the 1st day of December, A. D. 1903.

Present: Hon. Henry C. McDowell, judge.

Order as to hearing case.

INTERSTATE COMMERCE COMMISSION
vs.
CHESAPEAKE AND OHIO RAILWAY COMPANY et al. } In equity.

This day came the parties by their counsel in this cause, and submitted the same for argument, and having argued the same in part, the case was adjourned over until to-morrow morning at ten o'clock.

And at another day, to wit:

At a term of the circuit court of the United States for the western district of Virginia, given, continued, and held at Lynchburg, on Wednesday, the 2nd day of December, A. D. 1903.

Present: Hon. Henry C. McDowell, judge.

Order as to further hearing of case.

INTERSTATE COMMERCE COMMISSION
vs.
CHESAPEAKE AND OHIO RAILWAY COMPANY et al. } In equity.

This day came again the parties by counsel, and the same having been fully argued, and the court not being fully advised of the judgment to be given in the premises, takes time to consider thereof, and this case is continued.

192 The following fifteen statements of May, 1902, are copies of the accounts of sale made by the Chesapeake and Ohio Coal Agency Company, rendered to the Chesapeake and Ohio Railway Company, for each cargo of coal shipped to the New York, New Haven and Hartford Railroad Company for May, 1902, and illustrate the method of such returns by said Chesapeake and Ohio Coal Agency Company to the Chesapeake and Ohio Railway Company, and the item "A/c water freight"

shows the loss to the Chesapeake and Ohio Railway Company on such coal transportation under its tariff rate as stated in the affidavit of L. F. Sullivan, dated 28th November, 1903.

HARRISON & LONG,
Attys. for C. & O. Ry. Co.
THOS. L. MOORE,
U. S. Atty. for the W. Dist. Va.
DANIEL & HARPER,
Attys. for N. Y., N. H. & H. R. R. Co.

193 Chesapeake & Ohio Coal Agency Co.

Weight per bill of lading, 2,601 tons.
Consignee's weight, 2,601, 2,010/ tons.
Cargo No. 1559.

NEW YORK, *July 22, 1902.*

Account of sale of 2,601 2,010/ tons New River steam coal received May 3rd per bge. "Kentucky" at New Haven, and delivered to New York, New Haven & H. R. R. Co.:

2,601 2,010/ 2.75		$7,155.22	
A/c water frt		1,039.40	
			$8,194.62
Charges:			
Cost, 2,601 tons, .95		$2,470.95	
Vessel frt., 75c	1,951.42		
Less advance	158.11		
		1,793.31	
Dischg., .19		494.36	
Insurance		26.64	
			$4,785.26
Proceeds			$3,409.36
R. R. frt., 2,601 tons, 1.25	$3,251.25		
Advance	158.11		
	3,409.36		
Water frt. A/c	1,039.40		
Proceeds	2,369.96		

CHESAPEAKE & OHIO COAL AGENCY CO.,
Per W. W. WILLETT, *Treasurer.*

Weight per bill of lading, 3,006 tons.
Consignee's weight, 3,006 tons.
Cargo No. 1565.

NEW YORK, *July 22, 1902.*

Account of sale of 3,006 tons New River steam coal received at New Haven, and delivered to New York, New Haven & H. R. R. Co.:

3,006 tons, 2.75		$8,266.50	
A/c water frt		1,203.25	
			$9,469.75
Charges:			
Cost 3,006 tons, .95		2,855.70	
Vessel frt., 75c	2,254.50		
Less adv	184.22		
		2,070.28	
Discharging, .19		571.14	
Insurance		30.91	
			5,528.03
Proceeds			3,941.72
R. R. frt., 3,006 tons, 1.25	$3,757.50		
Advance	184.22		
	3,941.72		
Water frt. A/c	1,203.25		
Proceeds	2,738.47		

CHESAPEAKE & OHIO COAL AGENCY CO.,
Per W. W. WILLETT, *Treasurer.*

195 Chesapeake & Ohio Coal Agency Co.

Weight, per bill of lading, 3,005 tons.
Consignee's weight, 3,005 tons.
Cargo No. 1603.

NEW YORK, *July 22, 1902.*

Account of sale of 3,005 tons New River steam coal received May 15th per bge. "Iowa," at New Haven, and delivered to New York, New Haven & H. R. R. Co.

3,005 tons, 2.75		$8,263.75	
A/c water frt		1,202.74	
			$9,466.49
Charges:			
Cost 3,005 tons, 0.95		2,854.75	
Vessel frt., 0.75	2,253.75		
Less adv.	183.87		
		2,069.88	
Discharging, 0.19		570.95	
Insurance		30.79	
			5,526.37
Proceeds			$3,940.12
R. R. frt., 3,005 tons, 1.25	$3,756.25		
Advance	183.87		
	3,940.12		
Water frt. a/c	1,202.74		
Proceeds	$2,737.38		

CHESAPEAKE & OHIO COAL AGENCY CO.
Per W. W. WILLETT, *Treas.*

196 Chesapeake & Ohio Coal Agency Co.

Weight, per bill of lading, 3,000 tons.
Consignee's weight, 3,000 2,210/ tons.
Cargo No. 1638.

NEW YORK, *July 22, 1902.*

Account of sale of 3,000 2,210/ tons New River steam coal received May 23rd per bge. "Georgia" at New Haven, and delivered to New York, New Haven & H. R. R. Co.

3,000 2,210/ tons, 2.75		$8,252.71
A/c water freight		1,198.95
		$9,451.66
Charges:		
Cost 3,000 tons, 0.95	$2,850.00	
Vessel frt., 0.75	2,250.74	
Less adv	183.31	
	2,067.43	
Discharging, 0.19	570.19	
Insurance	30.73	
		$5,518.35
Proceeds		$3,933.31
R. R. frt., 3,000 tons, 1.25	$3,750.00	
Advance	183.31	
	3,933.31	
Water frt. a/c	1,198.95	
Proceeds	$2,734.36	

CHESAPEAKE & OHIO COAL AGENCY CO.
Per W. W. WILLETT, *Treasurer.*

197 Chesapeake & Ohio Coal Agency Co.

Weight per bill of lading, 2,603 tons.
Consignee's weight, 2,619 1,915/ tons.
Cargo No. 1666.

NEW YORK, *July 22, 1902.*

Account of sale of 2,619 1,915/ tons New River steam coal received May 31st, per bge. "Ocean Belle" at New Haven, and delivered to New York, New Haven & H. R. R. Co.

2,619 1,915/ tons, $2.75		$7,204.60
A/c water freight		1,011.32
		$8,215.92

Charges:

Cost, 2,603 tons, .95		$2,472.85	
Vessel frt., .75	1,964.89		
Less adv	157.71	1,807.18	
Dischg., .19		497.77	
Insurance		26.66	
			$4,804.46
Proceeds			$3,411.46
R. R. frt., 2,603 tons, 1.25	$3,253.75		
Advance	157.71		
	3,411.46		
Water frt. a/c	1,011.32		
Proceeds	$2,400.14		

CHESAPEAKE & OHIO COAL AGENCY CO.
Per W. W. WILLETT, *Treasurer.*

198 Chesapeake & Ohio Coal Agency Co.

Weight per bill of lading, 2,607 tons.
Consignee's weight, 2,607 tons.
Cargo No. 1562.

NEW YORK, *July 22, 1902.*

Account of sale of 2,607 tons New River steam coal received May 5th per bge. "Ocean Belle" at Providence, R. I., and delivered to New York, New Haven & H. R. R. Co.

2,607 tons, 2.81		$7,325.67	
A/c water freight		1,043.44	
			$8,369.11
Charges:			
Cost, 2,607 tons, .95		2,476.65	
Vessel frt., .75	$1,955.25		
Less advance	159.32	1,795.93	
Discharging, .25		651.75	
Insurance		26.71	
			4,951.04
Proceeds			$3,418.07

R. R. frt., 2,607 tons, 1. 25	$3, 258. 75	
Advance	159. 32	
	$3, 418. 07	
Water frt. a/c	1, 043. 44	
Proceeds	$2, 374. 63	

CHESAPEAKE & OHIO COAL AGENCY CO.
Per W. W. WILLETT, *Treasurer.*

199 Chesapeake & Ohio Coal Agency Co.

Weight per bill of lading, 2,999 tons.
Consignee's weight, 2,999 tons.
Cargo No., 1593.

NEW YORK, *July 22, 1902.*

Account of sale of 2,999 tons New River steam coal received May 13th per bge. "Indiana" at Providence, and delivered to New York, New Haven & H. R. R. Co.

2,999 tons, 2.81	$8, 427. 19	
A/c. water frt	1, 200. 32	
		$9, 627. 51
Charges:		
Cost, 2,999 tons, .95	2, 849. 05	
Vessel frt., .75	$2, 249. 25	
Less adv	180. 23	
	2, 069. 02	
Discharging, .25	749. 75	
Insurance	30. 71	
		5, 698. 53
Proceeds		3, 928. 98
R. R. frt., 2,999 tons, 1.25	$3, 748. 75	
Advance	180. 23	
	3, 928. 98	
Water frt. a/c	1, 200. 32	
Proceeds	2, 728. 66	

CHESAPEAKE & OHIO COAL AGENCY CO.,
Per W. W. WILLETT, *Treas.*

200 Chesapeake & Ohio Coal Agency Co.

Weight per bill of lading, 2,441 tons.
Consignee's weight, 2,441 tons.
Cargo No., 1598.

NEW YORK, *July 22, 1902.*

Account of sale of 2,441 tons New River steam coal received May 13th per bge. "San Joaquin" at Providence, R. I., and delivered to New York, New Haven & H. R. R. Co.

2,441 tons, 2.81	$6,859.21	
A/c. water frt	1,180.84	
		$8,040.05
Charges:		
Cost, 2,441 tons, .95	2,318.95	
Vessel frt., .80	1,952.80	
Discharging, .25	610.25	
Insurance	106.80	
		4,988.80
Proceeds		3,051.25

R. R. frt., 2,441 tons, 1.25	$3,051.25
Advance	3,051.25
Water frt. a/c	1,180.84
Proceeds	1,870.41

CHESAPEAKE & OHIO COAL AGENCY CO.,
Per W. W. WILLETT, *Treas.*

201 Chesapeake & Ohio Coal Agency Co.

Weight per bill of lading, 2,302 tons.
Consignee's weight, 2,302 tons.
Cargo No., 1599.

NEW YORK, *July 22, 1902.*

Account of sale of 3,202 tons New River steam coal received May 13th, per bge. "Sovereign of the Seas" at Providence, R. I., and delivered to New York, New Haven & H. R. R. Co.

2,302 tons, 2.81	$6,468.62	
A/c water frt	1,113.59	
		$7,582.21

Charges:		
Cost 2,302 tons, .95		$2,186.90
Vessel frt., .80		1,841.60
Discharging, .25		575.50
Insurance		100.71
		$4,704.71
Proceeds		2,877.50
R. R. frt., 2,302 tons, 1.25	$2,877.50	
Advance	2,877.50	
Water frt., a/c	1,113.59	
Proceeds	1,763.91	

CHESAPEAKE & OHIO COAL AGENCY CO.,
Per W. W. WILLETT, *Treas.*

202 Chesapeake & Ohio Coal Agency Co.

Weight per bill of lading, 2,431 tons.
Consignee's weight, 2,431 tons.
Cargo No., 1604.

NEW YORK, *July 22, 1902.*

Account of sale of 2,431 tons New River steam coal received May 15th, per bge. "G. R. Skolfield" at Providence, R. I., and delivered to New York, New Haven & H. R. R. Co.

2,431 tons, 2.81		$6,831.11
A/c water frt		1,057.06
		$7,888.17
Charges:		
Cost, 2,431 tons, .95		2,309.45
Vessel frt., .75	$1,823.25	
Less adv	148.82	
		1,674.43
Discharging, .25		607.75
Insurance		108.97
		4,700.60
Proceeds		3,187.57
R. R. frt., 2,431 tons, 1.25	$3,038.75	
Advance	148.82	
	3,187.57	
Water frt. a/c	1,057.06	
Proceeds	2,130.51	

CHESAPEAKE & OHIO COAL AGENCY CO.,
Per W. W. WILLETT, *Treas.*

203 Chesapeake & Ohio Coal Agency Co.

Weight per bill of lading, 1,549 tons.
Consignee's weight, 1,549 tons.
Cargo No. 1628.

NEW YORK, *July 22, 1902.*

Account of sale of 1,549 tons New River steam coal received May 22d, per bge. "City of Montreal" at Providence, and delivered to New York, New Haven & H. R. R. Co.

1,549 tons, 2.81	$4,352.69	
A/c water frt	673.53	
		$5,026.22
Charges:		
Cost, 1,549 tons, .95	1,471.55	
Vessel frt., .75	$1,161.75	
Less adv	94.38	
	1,067.37	
Discharging, .25	387.25	
Insurance	69.42	
		2,995.59
Proceeds		$2,030.63
R. R. frt., 1,549 tons, $1.25	$1,936.25	
Advance	94.38	
	2,030.63	
Water frt. %	673.53	
Proceeds	$1,357.10	

CHESAPEAKE & OHIO COAL AGENCY CO.,
Per W. W. WILLETT, *Treas.*

204 Chesapeake & Ohio Coal Agency Co.

Weight per bill of lading, 2,608 tons.
Consignee's weight, 2,608 tons.
Cargo No. 1631.

NEW YORK, *July 22, 1902.*

Account of sale of 2,608 tons New River steam coal received May 22d, per bge. "Kentucky" at Providence, R. I., and delivered to New York, New Haven & H. R. R. Co.

2,608 tons, 2.81	$7,328.48	
A/c water frt	1,043.83	
		$8,372.31

Charges:			
Cost, 2,608 tons, .95		$2,477.60	
Vessel frt., .75	$1,956.00		
Less adv	158.46		
		1,797,54	
Discharging, .25		652.00	
Insurance		26.71	
			$4,953.85
Proceeds			$3,418.46
R. R. frt., 2,608 tons, 1.25	$3,260.00		
Advance	158.46		
	3,418.46		
Water frt. %	1,043,83		
Proceeds	$2,374.63		

CHESAPEAKE & OHIO COAL AGENCY CO.,
Per W. W. WILLETT, *Treas.*

205 Chesapeake & Ohio Coal Agency Co.

Weight per bill of lading, 3,015 tons.
Consignee's weight, 3,015 tons.
Cargo No. 1667.

NEW YORK, *July 22, 1902.*

Account of sale of 3,015 tons New River steam coal received May 31st, per bge. "Ohio," at Providence, and delivered to New York, New Haven & H. R. R. Co.:

3,015 tons, 2.81		$8,472.15	
A/c water frt		1,206.74	
			$9,678.89
Charges:			
Cost, 3,015 tons, .95		2,864.25	
Vessel frt., .75	$2,261.25		
Less adv	183.76		
		2,077.49	
Discharging, .25		753.75	
Insurance		30.89	
			5,726.38
Proceeds			$3,952.51

R. R. frt., 3,015 tons, 1.25		$3,768.75
Advance.....		183.76
		3,952.51
Water frt. %.....		1,206,74
Proceeds.....		$2,745.77

CHESAPEAKE & OHIO COAL AGENCY
Per W. W. WILLETT, *Treas.*

206 Chesapeake & Ohio Coal Agency Co.

Weight per bill of lading, 3,963 tons.
Consignee's weight, 3,963 tons.
Cargo No. 1581.

NEW YORK, *July 22,*

Account of sale of 3,963 tons New River steam coal receiv
10th, per bge. "Harry Luckenbach," at Boston, Mass., and deli
New York, New Haven & H. R. R. Co.:

3,963 tons, 3.01.....		$11,928.63	
A/c water frt		2,179.35	
			$14,
Charges:			
Cost, 3,963 tons, .95.....		3,764.85	
Vessel frt. *frt.*, 85c.....	3,368.55		
Ltg., 30c	1,188.60		
		4,557.15	
Discharging, .20		792.60	
Insurance.....		39.63	
			9,
Proceeds.....			4,
R. R. frt., 3,963 tons, 1.25.....	$4,953.75		
Advance.....			
	4,953.75		
Water frt. %.....	2,179.35		
Proceeds.....	$2,774.40		

CHESAPEAKE & OHIO COAL AGENCY
Per W. W. WILLETT, *Treasurer.*

207 Chesapeake & Ohio Coal Agency Co.

Weight per bill of lading, 1,352 tons.
Consignee's weight, 1,352 tons.
Cargo No. 1669.

NEW YORK, *July 22, 1902.*

Account of sale of 1,352 tons New River steam coal received May 31st, per sch. "A. E. Manson," at Boston, and delivered to New York, New Haven & H. R. R. Co.

1,352 tons, 3.01		$4,069.52	
A/c water freight		418.26	
			$4,487.78
Charges:			
Cost, 1,352 tons, .95		1,284.40	
Vessel frt., .90	$1,216.80		
Less adv	110.48		
		1,106.32	
Dischg., .20		270.40	
Insurance		26.18	
			2,687.30
Proceeds			1,800.48
R. R. frt., 1,352 tons, 1.25	$1,690.00		
Advance	110.48		
	1,800.48		
Water frt. A/c	418.26		
Proceeds	1,382.22		

CHESAPEAKE & OHIO COAL AGENCY CO.
Per W. W. WILLETT, *Treasurer.*

208 *Evidence of E. D. Hotchkiss.*

By Mr. GLASGOW:

If your honor please, the stipulation of counsel in this case provided for affidavits being filed by the defendant and by the petitioner, and that either party should be entitled to cross-examine the affiants, and there is one affidavit which has been filed—it was filed on Saturday afternoon, as I understand—of Mr. E. D. Hotchkiss, general freight agent of the C. & O., and we would like at this time to cross-examine Mr. Hotchkiss.

I understand it is agreeable to the gentlemen on the other side, and if it is agreeable to the court, I would like to cross-examine Mr. Hotchkiss now.

The COURT. Very well.

E. D. HOTCHKISS, being first duly sworn, deposes as follows:

By Mr. GLASGOW:

Q. You are the general freight agent of the C. & O. Ry. Co., I believe?

A. Yes, sir.

Q. And have been since what date?

A. Jany. 1, 1887.

Q. In one of the affidavits which has been filed here, and made by you, you refer to C. & O. Ry. Co. through tariff, through freight tariff No. 5177. I will ask you to take that and look at it—that is a photographic copy of it, as I understand.

Mr. HARRISON. Which affidavit do you refer to?

Mr. GLASGOW. It is referred to in the last affidavit.

Q. That is the through rate sheet of the C. & O., is it; the through freight tariff?

A. I presume this is a copy of the original tariff.

Q. Which is the through tariff?

A. Yes, sir; through tariff.

209 Q. Through tariff from the New River coal field to New York, is it?

A. On its face it is the through coal tariff to New York.

Q. I believe, Mr. Hotchkiss, you say that that tariff which reads "through freight tariff No. 5177, rates of transportation, taking effect April 15th, 1895, by rail to Newport News, Va., thence by ocean and vessels on bituminous coal, wherein carloads—minimum weight, 12 tons—from mines to Newport News, Va., and in cargo quantities, by ocean and vessel from Newport News to destination, subject to ocean contracts and charters as arranged and accepted in advance of shipments from New River district (leaving out the stations) to New York, N. Y., $2.25 per ton 2,240 pounds," that on its face applies to traffic to New York?

A. It reads on its face to New York; it may be applicable to other points, however.

Q. Was that ever filed with the Commission?

A. Yes, sir.

Q. Filed under the act to regulate commerce?

A. According to our records it was filed; yes, sir.

Q. Which requires the through freight tariff to be filed with the Commission—that is the provision under which it was filed, was it?

A. It was filed in accordance with the provisions of law, as I understand it.

Q. And you say that tariff freight rates to New York was applicable to coal to New England?

A. Yes, sir; that is right.

Q. New England was not mentioned in the tariff, was it?

A. Not specifically.

Q. Now, I call your attention to the act to regulate commerce,
210 which provides that it shall be unlawful for any common carrier, party to any joint tariff, to charge, demand, collect, or receive from any person or persons a greater or less compensation for the transportation of persons or property, or for any services in connection therewith, between any points as to which a joint rate, fare, or charge is named thereon than is specified in the schedule filed with the Commission in force at the time." That applies, Mr. Hotchkiss, to through tariff rates, does it?

A. Yes.

Q. Now, I want you to explain to his honor how a tariff rate, or a tariff sheet, through tariff sheet, on coal from the New River district, on its face to New York, N. Y., of $2.25 a ton, could apply to New England coal?

A. In the first place, I should say it is questionable if the interstate-commerce law has jurisdiction over this particular tariff. I do not understand that the interstate-commerce law exercises control over water carriers, and more particularly the character of water carriers referred to in this tariff, which are sailing vessels, barges, etc. This tariff was made applicable to——

Q. Wait a moment——

Mr. HARRISON. Let him go ahead and finish his answer.

Mr. GLASGOW. Go ahead, then.

A. This tariff applied and was the only tariff applying upon bituminous-coal traffic moving beyond the Virginia capes at the time that this tariff was in effect and during its existence. As such, upon ocean contracts, charters, &c., being arranged, and the one shipper only handling the coal through to Newport News at that time, this tariff could be made and was made applicable to New Haven and other New England ports.

211 Q. Do you mean you collected $2.25 per ton on coal from the New River district to New England under that tariff?

A. I cannot testify as to the collection of the $2.25.

Q. What do you mean by saying "it applied?"

A. I should say that this tariff was applicable, as published, upon coal under those conditions.

Q. Was it applicable on coal going to Charleston, S. C.?

A. I do not know that I could testify as to that.

Q. Was it applicable on coal going to Havana?

A. I do not understand that that question is in this case.

Q. Was it applicable on coal going to European ports?

A. No, sir.

Q. Why should it be applicable any more to New England than to Charleston?

A. Because of the conditions that surrounded the movement of the coal, as stated.

Q. What conditions?

A. The conditions were—the one shipper handling coal from the C. & O. Ry. Co., diverging the coal at its will, in accordance with charters, ocean contracts, &c., arranged prior to the sailing of the coal from Newport News.

Q. That tariff don't say anything about ocean contracts, does it?

A. I think it does.

Q. Yes; I see—subject to ocean contracts. Suppose he wanted to send it to Charleston, would that have applied?

A. I do not understand that Charleston is involved.

Q. We are talking about the tariff now.

A. We are talking about the tariff as it applies.

Q. Would it have applied to all coal going out of the Capes?

A. It applies on coal going beyond the Capes, as indicated, to New York and New England points.

212 Q. Does it indicate New England?

A. No, sir; it indicates Northern ports, but it does not indicate Southern ports.

Q. Suppose it had been going to the Maine coast?

A. It would have been applicable.

Q. It would?

A. Yes, sir.

Q. Would there have been no difference in ocean rates between New England and New York?

A. Possibly.

Q. Would the $2.25 have applied?

A. I should say, yes.

Q. So that, when the interstate-commerce act provides for the filing of through tariff rates, and says that no more shall be charged between points, nor less between points named in such tariff, than specified therein, your idea is that a tariff sheet may be filed to New York, under which you could apply the traffic to anywhere in New England?

A. Under the conditions named on the face of the tariff.

Mr. GLASGOW. That is all I care to ask Mr. Hotchkiss.

Mr. HARRISON. We do not care to ask him any questions.

(Witness stands aside.)

213 *Opinion of the court. Filed February 19, 1904.*

INTERSTATE COMMERCE COMMISSION
vs.
CHESAPEAKE & OHIO RAILWAY COMPANY and The New York, New Haven & Hartford Railroad Company. } In equity.

This case arises from a bill filed by the Interstate Commerce Commission, praying an injunction. In brief, the bill alleges that the Chesapeake & Ohio Railway Company, to be hereinafter styled the C. & O., is carrying and intends to continue to carry coal at less than its published tariff rates for the New York, New Haven & Hartford Railroad Company, and is committing an illegal discrimination in favor of that company. Both defendants have answered, denying any violation of the interstate-commerce act.

On December 3rd, 1896, the following agreement was made. The body of the paper is partly printed and partly typewritten, and in the following copy the typewritten portions are in italics:

"Form E. 27.

Contract made between the *Chesapeake and Ohio Ry. Co.* of ——— ——— and the New York, New Haven and Hartford Railroad Company.

Said *Chesapeake & Ohio Railway Co.* ——— ———, for the consideration hereinafter mentioned, hereby agrees to furnish ——— *to* ——— said railroad company *not to exceed two million gross tons of bituminous coal from its line in such quantities monthly as wanted from July 1, 1897, to July 1st, 1902, without charge for demurrage, deliveries to be made not exceeding four hundred thousand tons per annum.*

And said *Chesapeake & Ohio Railway Company* ——— further agrees that all said *bituminous coal* ——— shall be of the best quality ———, first-class in every respect, and satisfactory to said railroad company, *and said railway company has the right to terminate this contract at any time if said bituminous coal be of poor quality, or if its delivery be unnecessarily delayed* ———.

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And said ——— *Chesapeake & Ohio Railway Company* ——— further agrees to deliver all *said bituminous coal* ——— to said railroad company *in its bins at such ports upon its line as required by the monthly requisitions of its purchasing agent.*

In consideration of the faithful performance by the said *Chesapeake & Ohio Ry. Co.* ——— of all its agreements herein contained, said railroad company agrees to pay for said *bituminous coal* ———, at the rate of *two and seventy-five one-hundredths dollars per gross ton New Haven basis* ———, settlement to be made ——— *monthly.*

Said railway co. has the right to cancel any and all portions of said quantity of bituminous coal remaining undelivered on July 1st, 1902.

Witness the names of the parties hereto this the third day of Dec., 1896.

(Signed) CHESAPEAKE & OHIO RY. CO.,
By M. E. INGALLS, *Pres't.*

(Signed) THE NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY,
By C. S. MELLEN, *Second Vice-President.*

For value received, I hereby guarantee that the Chesapeake & Ohio Ry. Co. shall not fail to deliver coal on account of strikes.

J. PIERPONT MORGAN."

215 Under this contract the C. & O. delivered between July, 1897, and July, 1902, much the greater part of the two million tons; but at the expiration of the time fixed in the contract, there were still some 59,966 tons not delivered. Owing to a strike of the coal miners of both the New River and Kanawha fields then in force, the C. & O. was unable to supply the shortage, and the New Haven Company purchased the requisite amount where it could, and later presented a bill to the C. & O. of something over $103,000 for the excess of the cost of the coal thus purchased over the price agreed upon in the contract above set out.

In April, 1903, a verbal agreement was made between the two companies to the effect that the C. & O., in lieu of paying this bill of damages, would compromise the claim by delivering the 59,966 tons of coal at the price named in the contract of 1896. At the time of this last agreement the cost of the coal at the mines and the cost of vessel freight, insurance, and discharging were much higher than in 1896. The following table (No. 1) shows the time of shipment, number of tons delivered under this verbal agreement, the cost of the coal at the mines, the water freights, discharging costs, insurance, and the price received for the coal (which is somewhat more than $2.75 per ton, as deliveries were made at ports other than New Haven). During this period the published tariff rate of the C. & O. on such coal was $1.45 per ton from the Kanawha field in West Virginia (where this coal was obtained) to Newport News, Virginia. Table No. 2 shows the loss to the C. & O. on these deliveries of 1903.

216 *Table No. 1.*

Date.	Tons delivered.	Cost at mines.	Water freight.
1903–May	17,627 tons & 2,160 lbs	$22,563.79	$16,429.60
" June	16,141 " & 1,870 "	20,661.48	14,042.01
" July	4,309 " & "	5,515.52	3,878.10
Totals ..	38,078 " & 1,790 "	48,740.79	34,349.71

Table No. 1—Continued.

Date.	Discharging.	Insurance.	Price rec'd.	C. & O. freight, at $1.45.
1903–May	$4,107.66	$176.28	$49,455.04	$25,560.45
" June	3,722.17	161.43	45,224.63	23,405.66
" July	1,077.25	74.35	12,108.29	6,248.05
Totals	8,907.08	412.06	106,787.96	55,214.16

Table No. 2.

Date.	Total costs, exclusive of C. & O. freight.	Total rec'd	Balance.	Loss to C. & O.
1903–May	$43,277.33	$49,455.04	$6,177.71	$19,382.74
" June	38,587.09	45,224.63	6,637.54	16,768.12
" July	10,545.22	12,108.29	1,563.07	4,684.98
Totals	92,409.64	106,787.96	14,378.32	40,835.84

217 Further deliveries were stopped by the service of a temporary injunction issued on the bill in this case.

The published freight rate of the C. & O. on coal per ton from the New River (West Virginia) field, from which field came all the coal delivered prior to 1903, to Newport News, Virginia, destined for points beyond the Capes of Virginia, were, from March 8th, 1899, to January, 1903, as shown by the following table. There is no disagreement as to these rates:

March 8, 1899	.90
May 13, 1899	.80
Jany. 17, 1900	.85
Feby. 1, 1900	1.00
April 2, 1900	1.15
April 1, 1901, to Jany., 1903	1.25

There is a disagreement as to the rates in force from July 1st, 1897, to March 8th, 1899. The complainant contends that the rates applicable to the coal delivered during this period are the local rates—$2 per ton from July, 1897, to January, 1899, and $1.55 per ton during January and February, 1899. The C. & O. contends that it had duly established and in force from July 1st, 1897, until January 2nd,1899, a through rate of $2.25 per ton, of $2 per ton on January 2nd, 1899, and of $1.75 per ton from January 3rd, 1899, until March 8th, 1899. There is evidence that at least one of the through tariff sheets (C. & O. 5,177) is not on the files of the Interstate Commerce Commission; but there is also testimony that this sheet was duly mailed to the then auditor of the Commission. Another objection to this sheet is that it applies, as stated thereon, only to coal destined for New York City. While there is room for doubt as to the proper construction of these through tariffs, it seems to me unnecessary to settle these questions. Conceding, for argument's sake, that the contention of the C. & O. is sound, still the part of
218 the through rate applicable to the C. & O. for carriage from the coal field on the coal in question was the difference between the through rate and the (varying) aggregate of the costs of vessel freight, marine insurance (paid by the C. & O.), and the cost of discharging.

To illustrate:

In July, 1897, the average cost per ton for vessel freight was	.651
Cost of discharging was	.226
Insurance was	.008
Total	.885

As the through rate was $2.25 per ton, it follows that the C. & O. freight rate on such coal for that month was $2.25 minus 0.885¢, or $1.365 per ton.

Now, the cost of the coal per ton was 70¢, and the average price per ton received from the New Haven Co. $2.845.

The cost items, when added, are:

"Water costs," per ton	.885
C. & O. freight	1.365
Cost of coal at mines	.70
Total per ton	$2.95
The selling price being	2.845
The average loss per ton was	.105

As 28,890 tons and 1,140 lbs. of coal were shipped during that month, the actual loss was $3,033.50.

On this basis, upon making the calculation, it appears that there was always a loss to the C. & O. until January, 1899. For January and

February, and from April to and including October, 1899, there was, on the basis most favorable to the defense, a profit. That is, the price received for the coal was in excess of all cost items, including the proper C. &. O. freight charge. Since October, 1899, there has always been a loss. Stopping the account at January 1st, 1903, the losses
219 largely exceed the gains. The following table (No. 3) shows the result of these calculations. I have not taken into account the one day in January, 1899, when the "through rate" was $2.00. There is no evidence of the tonnage of that day, and (as being more favorable to the C. &. O.), I have used $1.75 as the "through rate" for all of the January, 1899, shipments. Moreover, the shipments of this single day would not materially vary the result.

220 *Table No. 3.*

Year.	Month.	Loss.	Profit.
1897	July	$3,033.50	
"	Aug	2,745.73	
"	Sept	2,762.94	
"	Oct	3,223.84	
"	Nov	3,174.39	
"	Dec	4,103.85	
1898	Jan	4,074.44	
"	Feb	6,494.20	
"	Mch	3,468.78	
"	Apr	4,066.98	
"	May	3,796.18	
"	June	4,740.79	
"	July	1,931.05	
"	Aug	2,372.83	
"	Sept	1,602.53	
"	Oct	6,241.19	
"	Nov	2,880.17	
"	Dec	3,020.64	
1899	Jan		$10,564.10
"	Feb		4,176.40
"	Mch	736.78	
"	Apr		2,355.89
"	May		11,133.49
"	June		12,852.02
"	July		16,118.33
"	Aug		7,328.58
"	Sept		5,051.39
"	Oct		3,495.34
"	Nov	6,864.35	
"	Dec	8,631.19	
1900	Jan	6,966.86	
"	Feb	9,223.85	
"	Mch	6,752.49	
"	Apr	9,790.83	
"	May	9,692.80	
"	June	5,679.18	

Table No. 3—Continued.

Year.	Month.	Loss.	Profit.
1900	July	$4,484.43	
"	Aug	3,825.20	
"	Sept	9,514.55	
"	Oct	10,976.07	
"	Nov	5,776.44	
"	Dec	4,580.15	
1901	Jan	6,979.37	
"	Feb	7,904.26	
"	Mch	8,919.80	
"	Apr	7,280.08	
"	May	14,041.55	
"	June	12,448.37	
"	July	12,503.56	
"	Aug	13,994.21	
"	Sept	12,321.14	
"	Oct	15,670.35	
"	Nov	14,655.69	
"	Dec	6,164.61	
1902	Jan	15,796.44	
"	Feb	11,392.78	
"	Mch	13,141.42	
"	Apr	15,072.40	
"	May	16,787.81	
"	June	2,731.63	
		375,034.67	73,075.54
		73,075.54	
	Net loss	301,959.13	

221 In addition to the foregoing loss there is another large loss to be considered. In the answer of the C. & O. (59–60 record) it is said that by reason of nondeliveries in 1900 and 1901 (at which period all deliveries were made at a loss to the C. & O.), the latter became indebted for damages in the sum of $160,000. This damage claim was compromised by the payment to the New Haven Company of $130,000.

It is now necessary to consider and determine two disputed points as to the meaning of the contract above set out. It is remarkable that in this brief contract, involving over five and a half millions of dollars, there are at least two serious mistakes, if the contract be construed as contended for by the defendants. Twice the words "Railway Company" are used where, as is insisted, the words "Railroad Company" were intended. As to the first instance, I am inclined to think that the paper should be construed as contended for by the defendants. The clause in question reads: "And said railway company has the right to terminate this contract at any time if said bituminous coal be of poor quality or if

its delivery be unnecessarily delayed." It does not appear that the legal advisers of either company inspected this paper when it was executed, and this error may have escaped the attention of the laymen who signed it. To read the paper in this respect as written and as contended for by counsel for the Commission would give it an extraordinary effect. It would give the C. & O. the right to terminate the contract if the coal, to be procured by it, should be of "poor quality," or if deliveries, to be made by the C. & O. Railway Company are "unnecessarily delayed." I can not believe that the parties to this paper had in mind deliveries by coal operators to the C. & O. They intended, I think, to refer to deliveries to the New Haven road at its bins at the different ports. It is true
222 that the contract gave the New Haven Company an option as to the amount of coal (not exceeding the stated limit) it might order. But I think this clause was intended to cover the contingency of an order being made by the New Haven Company, and the coal on delivery being of poor quality or the deliveries being unduly delayed.

In the latter disputed clause, the contract as written gives the C. & O. the right to cancel all portions of the quantity remaining undelivered on July 1st, 1902. Mr. D. H. Matson (144–5 record) says in his affidavit that a clause reading "Any portion of this tonnage not shipped by ———, on which date this contract will expire, shall be cancelled," or a clause permitting the seller to cancel all coal not delivered within the period provided for upon certain conditions, has been and is the usual course of business among dealers in coal. The proper construction of this cancellation clause is a matter of some difficulty. The parties to the contract, prior to the institution of this suit, construed it as giving, not the C. & O., but the New Haven Company, the right to cancel. The contract as a whole is, I think, an option on the part of the New Haven Company. But I do not think the intent was to make the cancellation clause read so as to give that company the right to cancel deliveries not made prior to July 1st, 1902. There was no need for such a clause. The paper only obligated the New Haven Company to pay for such coal as it called for, and as was delivered prior to that date. On the other hand, such being the custom in drawing such contracts, I think the intent was, that this clause, standing alone, should be read as it is written. However, this clause must be read in connection with the guarantee. The construction of the two read together seems to me to be that the C. & O. need not deliver any tonnage undelivered prior to July 1st, 1902, unless the failure to deliver arose from strikes. As strikes caused the
223 nondelivery of the entire tonnage prior to July 1st, 1902, I think it proper to construe the contract as the parties construed it, and hold that the cancellation clause did not of itself absolve the C. & O. from the, at least apparent obligation to deliver the balance of the coal.

The next question presented for solution is whether or not the C. & O., in the transactions prior to April, 1903, was the vendor of the coal. It is true that the C. & O. is chartered by Virginia, and that nothing in the Virginia charter to which my attention has been called, and nothing in the later acts of the Virginia legislature cited, authorizes it to become a dealer in coal. Prior to the making of the contract of 1896, the legislature of West Virginia (in which State the C. & O. is understood to do business under legislative license) passed an act (February 15th, 1895) which forbids any railroad company to buy and sell coal and coke, or to lend its credit to anyone engaged in such business (169, record). And in the affidavit of Mr. E. D. Hotchkiss, general manager of the C. & O. (122 et seq., record) he tells us that upon the passage of this act, the C. & O. ceased to "handle" coal (as it had formerly done) through one of its own departments, and that a separate company—the C. & O. Coal Agency Company—in which the C. & O. had no interest, was formed, which became the agent of the coal operators of the New River and Kanawha fields for selling coal destined beyond the capes of Virginia. This company was the sole agent until April, 1900. After this date, several other persons and companies engaged also in this business. These agencies, as Mr. Hotchkiss says, agreed with the coal operators on a price f. o. b. at the mines, arranged for vessels and their freight, and a delivery price of coal in the Eastern market. But in the affidavit of M. E. Ingalls, who was president of the C. & O. until February 1st, 1900 (114, record), we find that "as soon as said contract [of 1896] was made, he, the said M. E. Ingalls, made arrangements with Mr. J. L. Beury, the Greenwood Coal & Coke Company, and the Laurel Creek Coal & Coke Company, whereby the said operators undertook to furnish the coal to supply this contract." The arrangement made with Beury and others is found in the letter of guaranty and the written contract, which are here set out.

224

"Chesapeake & Ohio Railway Co.,
M. E. Ingalls, president.

CINCINNATI, OHIO, *December 11, 1896.*

The GREENWOOD COAL & COKE CO.,
The LAUREL COAL & COKE CO.,
J. L. BEURY, esq.

DEAR SIRS: Referring to a contract executed this day by you, as parties of the second part, with J. W. Hopkins, party of the first part, for the sale of four hundred thousand tons of coal per annum, for five years from the first of next June, for valuable consideration the Chesapeake & Ohio Railway Company hereby guarantees the faithful performance of said contract by said Hopkins.

Yours, truly,

President.

This agreement, made and entered into this eleventh day of December, 1896, by and between J. W. Hopkins, party of the first part, The Greenwood Coal & Coke Company, and The Laurel Creek Coal & Coke Company, corporations chartered under the laws of the State of West Virginia, and doing business in the county of Fayette, West Virginia, and J. L. Beury, parties of the second part:

Witnesseth: The party of the second part hereby agrees to fur-
225 nish, and the party of the first part to take, unless prevented by strikes or other causes beyond their control, 400,000 tons of run-of-mine steam coal, of full commercial quality, each and every twelve months, commencing June first, 1897, and ending July first, 1902.

The party of the first part agrees to pay, and the party of the second part agrees to accept, seventy cents per ton of 2,240 pounds, free on board cars on the line of the Chesapeake & Ohio Railway Company, in full payment therefor; all coal to be delivered over dock to vessels at Newport News each calendar month, to be paid for in cash on or before the twenty-fifth day of the month succeeding.

In case of an advance in the price of mining, the party of the second part shall give notice of such proposed advance to the party of the first part, and if said party of the first part declines to pay such advance, it shall be optional with the party of the first part to terminate this contract.

Second party to be furnished by the party of the first part each and every day cars in sufficient number to take the full portion daily of the 400,000 tons per year; coal delivered by the party of the second part to be open to the inspection of such party or parties as may be appointed by the party of the first part, and if not found to be standard run-of-mine coal, to be subject to rejection. Should either party to this contract make claim of unfair inspection, the matter to be left to arbitration.

The deliveries of coal under this contract are for business outside of any present delivery made over the line of the C. & O. road, and not obtainable at existing prices.

The existing charge of 75 cents per car made by the Chesapeake & Ohio Railway Company for delivery of cars to their main line is to be abolished on coal delivered under this contract.

226 In order to develop the mines sufficiently to produce the requisite 400,000 tons per annum required under this contract, agreement is made to take, commencing with the execution of this contract, all coal possible, and as regularly as may be from the before-mentioned Greenwood and Laurel mines at current prices, until entering upon the performance of this contract.

Payments for coal delivered under this contract are to be made to the legally authorized representatives of the Greenwood Coal & Coke Company and the Laurel Creek Coal & Coke Company.

In witness whereof, the parties hereto and to a duplicate hereof, have hereunto set their names and caused their corporate seals to be hereunto attached the day and year first above written.

(Signed) J. W. HOPKINS.

THE GREENWOOD COAL & COKE COMPANY,
(Signed) By JOSEPH LAWTON, *its President.*

THE LAUREL CREEK COAL & COKE COMPANY,
(Signed) By E. T. ROBINS, *its President.*

(Signed) J. L. BEURY.

Attest:

(Sgd.) J. E. ROBINS, *Sec'y.*
(Sgd.) E. G. RIDDLE, *Sec'y.*

The Mr. Hopkins who signed this contract has given his affidavit. He says (172, record) that he was prior to January, 1899, connected with the "Fuel department of the Chesapeake & Ohio Railway Company;" that from January 1st to about June 1st, 1899, he was general agent of the New River Consolidated Coal Company; and that since June 1st, 1899, he has been the general agent of the C. & O. Coal Agency Company. He further says that he made the contract above set out with Beury et al., "under instructions of M. E. Ingalls, president of
227 the Chesapeake & Ohio Railway Company."

In the testimony of Mr. Stevens before the Commission (14 record) he says that Mr. Ingalls made the contract with the operators to furnish the coal. Again, page 23, during this examination, when the fact appeared that the association of operators—which had assumed the obligations of Beury and his associates—had failed to comply with the contract, both Mr. Stevens and Mr. Wickham, the learned general counsel of the C. & O., expressed the belief that the association could not have been successfully sued for this breach of contract. And the reason seems clearly to be that the West Virginia statute above referred to made the contract with the operators an illegal one. If so, it was because the contract was not with J. W. Hopkins, an individual, as it purports to be, but was in reality with the C. & O.

Therefore, despite the irreconcilable conflict between the statement of Mr. Hotchkiss and those of the other witnesses for the C. & O., it seems to me that in truth the C. & O., in violation of the West Virginia statute of 1895, was the first party to the Beury contract, and that as to the transactions prior to April, 1903, we must treat it as a carrier which purchased coal at mines on its road and delivered it to a purchaser after hauling the coal over its own line and having it carried and discharged by vessels employed by it.

Inasmuch as no action by the court is asked, because of the transactions prior to 1903, the legality of the contract of 1896 is of interest

now, because on its legality depends the validity of the demand made in April, 1903, by the New Haven company that the C. & O. pay the bill of damages of about $103,000. In the answers of both defendants the justice of this demand is asserted. This bill is alleged to be (and
228 I find no evidence to the contrary) the actual difference between the cost of the coal purchased by the New Haven company from others and what would have been the cost to it had the C. & O. fulfilled the contract of 1896. This demand, therefore, cannot properly be considered an unadjusted or vague and unliquidated claim. The inference to be drawn from Goodridge vs. Union Pacific, 37 Fed., 182, and Union Pacific vs. Goodridge, 149 U. S., 690, is that an adjusted claim, if otherwise valid and enforceable, may be paid by a carrier by hauling for such creditor at a reduced rate, the difference between the schedule rate and the agreed rate being applied as a credit on the claim. While these opinions are obiter as to the question which we are now considering, as it did not arise in the above-mentioned case, still it seems to me that this conclusion is sound. Where a carrier owes a legal, enforceable, and ascertained sum of money, I cannot perceive that the commerce act is violated if the debt be paid by carriage done by the carrier for its creditor at the carrier's legal freight rate.

At this point we should determine whether or not the contract of 1896 can be held invalid and the demand arising from its nonfulfillment unenforceable because it was ultra vires. I am now considering the question without regard to the commerce act, and am merely considering the proposition that the charter of the C. & O. gave it no power to become a dealer in coal. As has been frequently said, "The words 'ultra vires' and 'illegality' represent totally different and distinct ideas." (27 Am. & Eng. Ency. (1st ed.), 352 and notes.) While I have not stopped to make a thorough examination of the authorities, my understanding of the law is as follows: For ultra vires acts the sovereignty chartering the corporation may forfeit its charter, and may possibly have such acts enjoined. When a corporation is sued on an ultra vires contract it may usually, but not always, plead ultra
229 vires. A stockholder, or a creditor, of a corporation may have the commission of ultra vires acts enjoined, and may, perhaps, require the corporation to make the defense of ultra vires in some cases. But, so far as I am aware, no third party can be heard to raise this question, unless in some cases where such party is directly injured by the ultra vires act. It is true that the C. & O. is here relying on the obligation of an ultra vires contract. But until some one having the right so to do has the contract of 1896 declared by a court of competent jurisdiction void on the ground of ultra vires, I do not perceive that we have here any right to consider the question. (See 4 Thomp. Corp., 5638; 5 ibid., § 6030, 6032, 6033, 6034.) For reasons of business policy, both the managers of the C. & O. and its stockholders, so far as here appears,

prefer not to raise the question of ultra vires. The State of Virginia has not raised it, and no creditor has raised it. No Federal law has been contravenced by this contract (in so far merely as it is ultra vires), and I do not perceive the right of the Interstate Commerce Commission to raise the question here.

We must now consider the alleged invalidity of the contract of 1896 under the West Virginia statute. As I understand the facts, the C. & O. is a Virginia corporation. It does business in West Virginia under a legislative license, but it is to be here treated as a creature of the Virginia law. The contract does not stipulate that the C. & O. shall go into West Virginia and there buy coal. I say this because, while the contract was to furnish coal from the line of the C. & O., there is no evidence that there is no bituminous coal field on the line of the C. & O. in Virginia. The burden of proof here is on the complainant (Benjamin on Sales (6th ed.) page 509). This court can not take judicial
230 notice of the fact (if it be such) that the only coal fields on the line of the C. & O. are in West Virginia. Moreover, this contract could have been complied with to the letter if the C. & O. had purchased of dealers in Virginia coal that had been mined on its line in West Virginia, and which had been brought into Virginia while the property of the dealers. And, surely, a contract by a Virginia corporation, not made in West Virginia, and not to be performed in that State, can not be held by this court to be in contravention of the West Virginia statute. To so hold would give the West Virginia statute an extra-territorial force which seems to me to be unauthorized. Suppose, for instance, a bank which is authorized by the law of the State chartering it to take real-estate security for loans, also does business in another State which does not authorize the taking of such security. If such bank, in the State which charters it, sues to enforce such a contract, there made, I can not think that the courts of that State would hold the contract illegal because forbidden by the law of the other State. Hence it seems to me that this court can not hold the contract invalid, unless it be because the New Haven company contemplated that the coal was to be purchased by the C. & O. in West Virginia. There are many cases holding that a vendor of articles, which he knows his vendee will use in a manner contrary to law, can recover the contract price of such articles if the vendor did not himself participate in the illegal act. See 27 Am. & Eng. Ency. (1st ed.), page 389 and note; Tracy vs. Talmadge, 14 N. Y., 162, s. c. 67 Am. Dec., 132 and note; 2 Parsons Contracts (7th ed.), bottom page 894. To be sure, the vendee of an article which he knows his vendor intends to procure in violation of law is not in as strong a position as are the vendors in the above cases. Where a vendee contracts to buy that which he knows his vendor is to pro-
231 cure by an act prohibited by law, he is probably to be considered as a sharer in the illegal enterprise as particeps criminis. In

the case at bar, the C. & O. intended to purchase the coal in violation of the statute in question, and did do so. If the New Haven Company knew of this intent there might be room for the contention that this court would, on grounds of public policy, hold the contract of 1896 void. But here again the burden of proof is on the complainant. While I have a strong suspicion that Mr. Mellen knew that Mr. Ingalls intended to purchase the coal in West Virginia, this fact is not proven. And so far as I can say from this record, Mr. Mellen may have supposed that the coal would be mined in Virginia, or at least purchased from coal operators or dealers in Virginia. Where a contract does not require the vendor to do an act prohibited by law in order to obtain the property he is selling, and where the vendee does not know of the illegal intent of the vendor, and especially where the contract could be performed without a violation of the law, it seems to me that this court would not be warranted, were the vendee here suing the vendor for the breach of the contract in allowing the latter to raise the question of illegality. To allow the delinquent to escape the obligation of his contract under such circumstances savors too strongly of allowing a wrong doer to take advantage of his own wrong. If this question could not be raised in this court by the C. & O. itself, when sued on the contract, surely no third party can raise it collaterally.

If my conclusions thus far are sound, we are now brought to consider the validity of the contract of 1896 as affected by the Inter-State Commerce Act. In making this contract, the C. & O. intended to, and did (in so far as it made deliveries prior to 1903) become the purchaser of the coal. We are not at liberty to consider the question of ultra
232 vires, nor are we free to treat the contract of 1896 as illegal on account of the West Virginia statute. If the commerce act was not violated by the transactions prior to April, 1903, then on that date the C. & O. was, so far as this court can say, legally obligated to pay to the New Haven Company the $103,000 claimed as damages for failure to make deliveries.

I understand from counsel that the question now presented has never been adjudicated by any Federal or State court of this country, and owing to the many demands on my time I have not undertaken to make a search of the books. I assume that were there any adjudications, counsel would have found them. There are two rulings of the Inter-State Commerce Commission relied on by the defendants (Haddock vs. Delaware, etc. Co., 4 I. C. C. Repts. 296, and Coxe Bros. vs. Lehigh R. Co., ibid., 535) and another (Grain Rate Case, 7 ibid., 33) relied on by the complainant, which I think are sufficiently unlike the case at bar to deprive them of force. But, if not, these rulings are merely persuasive, and their existence does not relieve me of the duty of reaching my own conclusions.

There is no Federal statute, so far as I know, which in express terms forbids interstate carriers to become dealers in articles of transport. It is, I think properly, admitted by counsel for C. & O. that in case a carrier becomes a dealer for the purpose of giving its purchaser (or any favored person) a rebate, such transaction would be obnoxious to the second section of the act. On this point there is no difference of opinion. And in the case at bar I do not find anything which satisfies me that the C. & O., in making the contract of 1896, had any special design to give a rebate to the New Haven Company, or to any particular coal operators. In other words, I do not find here that the contract of 1896 was intended as a ruse or device to evade the commerce act. The contract was
233 made at a time of extreme financial depression. It appears to have been an entirely honest effort by Mr. Ingalls to find a market for coal produced on his line. The second section of the act is directed only at charging to or receiving from some (directly or indirectly) less than is charged to or received from others for services rendered in transporting passengers or property. To arrive at the true intent of a statute, the reasons inducing to enactment, and especially the evils sought to be remedied, are to be considered. But still an intent can not be found in a statute unless the statute contains apt and sufficient words to express or fairly imply such intent. We are now, therefore (confining ourselves to the second clause for the present), brought to consider this question:

Can an interstate carrier buy and then sell articles, to be carried over its own line, at a price less than the aggregate of the cost and expense items and its own published freight rate? Always excepting cases where such dealings are mere devices to cover an intentional giving of a less rate for carriage to some than to others, it seems to me that this question must be answered in the affirmative in so far as the second section of the act applies.

If in thus dealing in and carrying such article the carrier credits its freight account with the published rate, we can only say that it is carrying for its vendee at a too low rate by saying that a carrier can not suffer, if it wishes or must, a loss as a dealer. Whether it can or not will be considered a little later. If the carrier under such circumstances does not on its books credit its freight account with its published rate, and does not charge the loss to an account kept with the article dealt in, or to income, there would be a seeming violation of the 2nd and 6th sections of the act. But this would be at the utmost a technical
234 violation (if it has a right to suffer a loss as a dealer), and it seems to me that it could with difficulty be considered a violation in any sense. The law is not concerned with the carriers' methods of bookkeeping. Where the dealing is not a device to evade the law, and if a carrier can legally suffer a loss as a dealer, it seems to me a matter of no moment that it go through the form of crediting its full freight earnings

on the transportation account, and charging the loss on the transaction to an account kept with the article dealt in, or to some other account.

Now to recur to the proposition that a carrier acting in good faith can suffer losses as a dealer without violating the second section of the act. Let us suppose that the C. & O. were to make a contract to deliver New River coal to a purchaser in New England at a price which at the time covered the cost of the coal, its own published freight charges, and all water costs. We will also assume, as we are seeking an illustration where the contract is made in perfect good faith, that neither party to the contract has any reason to suppose that the cost of the coal, or the water costs, will, during the life of the contract, advance. With the contract price equal to all cost items and the carrier's full freight rate, I can not perceive any ground for assailing the legality of the contract, or of acts done in performing it. When the cost items increase there is a loss to be suffered by the carrier-vendor. To say that this loss is necessarily a loss on carriage, and hence a rebate on freight rates to the purchaser, seems to me to beg the question. A statute which goes no further than to forbid carrying for one at less than the price charged others is not sufficient warrant for holding that a loss suffered by a carrier-vendor has to be considered as a loss on carriage. If there were a Federal statute
235 forbidding a carrier to become a dealer, or if there were a statute forbidding a carrier-dealer to sell articles of transport at less than the aggregate of all cost items and its own published freight rate, or if there were a statute providing that in such cases all losses must be treated as losses on carriers, the way would be clear. But, with the law as it is, in so far as the second section of the act goes, I fail to find authority for saying that loss under such a contract must necessarily be treated as a loss on carriage. Failing to find, so far, any law forbidding a carrier-dealer to suffer a loss as dealer, we are not always with the unanswerable proposition that the loss under such a contract can just be properly be treated as a loss suffered as dealer as it can as a loss on carriage.

It is true that at the very inception of the contract of 1896, the cost items, and the lowest rate that seems to me possible to be considered as the legal freight rate of the C. & O., were greater than the contract price. But unless this showed the contract to be a device to evade the second section, this fact is to my mind of no importance. If, for instance, a carrier has purchased a large quantity of some article, intending in the future to sell and carry it, and the market price declines, I do not perceive anything in the 2nd section that would prevent the vendor-carrier in such case from suffering a loss on the article.

It is true that where, at the very inception of the contract, there is a loss to the vendor-carrier, it is somewhat difficult to ascribe an intent to lose on the article dealt in, rather than an intent to simply carry at less than the rates given to the public. But in the case at bar, I am unable to find evidence of an intent to carry at less than the published rates of

the C. & O. There is no evidence that, at the time he made the
236 contract of 1896, Mr. Ingalls knew the prices he must pay the coal operators or the water carriers. Both the contract with Beury et el. and that with the water carrier were made after the contract with the New Haven company. When the contract of 1896 was made, Mr. Ingalls may have expected to purchase the coal at so low a price, or to procure water carriage and discharging at so low a price, that the aggregate of cost items and the C. & O. freight rate would have been at least equalled by the contract price to be paid by the New Haven company. And if such be the fact, we have a case of unexpected loss to deal with. But, even assuming that Mr. Ingalls knew the price he must pay for the coal and the water costs, and that he knew that the contract price was not sufficient to pay these costs and the C. & O. published freight rate, still it does not seem to me to necessarily follow that he intended to carry the coal at less than the published rates. To say that it does follow is to say that a vendor-carrier must treat its losses on a contract of sale and carriage as losses as carrier, or as reductions of its freight rate, and can not treat them as losses suffered as a dealer. It is true that the effect to the carrier, to its vandee, and to the public, is exactly the same, whether the transaction be considered as a loss on carriage (and hence a rebate on freight rates) or as a loss suffered on the article dealt in. But this fact does not, as it seems to me, give us a right to say that such losses must be treated as losses or rebates on carriage. In other words, if a carrier may become a dealer, it may suffer losses as a dealer; and if so, except for its bearing on the bona fides of the transaction, these losses may as well be expected and contemplated losses, suffered from the inception of the transaction, as losses arising from unforeseen contingencies. I can readily believe that it was good
237 business policy for a carrier situated as was the C. & O. in 1896, to contract knowingly to suffer a considerable loss on even a very large contract, in order to keep a great number of mines on its line in operation. I can find no evidence in the record which satisfies me that in making the contract of 1896, the C. & O. intended a ruse or device to give a rebate on freight rates to the New Haven company. The 2d section is limited in its application. It can not be declared violated unless the transaction was a ruse or device to carry at less than legal rates, or unless there was, directly or indirectly, a carriage at a too low rate. As before remarked, to say that the losses suffered by the C. & O. must be treated as a carriage at a too low rate is to assert that the honest losses of a vendor-carrier must be treated as reductions in freight rates, and can not be treated as dealer's losses. To so hold is to lose sight of the carrier's relation to the transaction as vendor.

It is further said that in the case at bar, the evidence shows that the C. & O. agent, on receiving payment from the New Haven company, first paid the operators and the water carriers in full, and then turned into

the C. & O. treasury, on account of freight earnings, the insufficient remnant. It is therefore contended that in fact there was in this case an actual rebate on carriage. But it does not seem to me that the result is varied by this fact. Speaking now only of a case in which there has been no intent to violate the 2d section of the act by some device, and of a case in which a carrier-vendor has acted in good faith, it seems to me that the facts above stated make out only a seeming case of violation of the 2d section. The reason for this conclusion is that the law is concerned only with practical results, and is not concerned with the order in which a vendor-carrier pays its honest losses, or with its methods
238 of bookkeeping. If the C. & O. agent had first, out of the receipts from the New Haven company, turned into the C. & O. treasury a sum sufficient to pay the full freight rates, and had then drawn on the C. & O. treasury for funds to make up the sums necessary to pay in full the demands of the coal operators and the water carriers, the practical result, to the vendor-carrier, to its vendee, and to the public, of such procedure, would have been precisely the same as that of the method said to have been actually adopted. To say that the method of handling the receipts constitutes a violation of the 2d section is to say that the law is concerned with mere matters of form, or with the order in which a vendor-carrier pays its losses, although the practical result is the same of that of another order of payment which is not a violation of the 2d section, if the vendor-carrier is not forbidden by the law to suffer honest losses as a dealer. Being unable, therefore, to find in the law anything which forbids a carrier to be a dealer in articles to be carried by it, and also being unable to find anything which forbids it as a dealer to suffer honest losses, I am unable to say that the transactions in question were in violation of the 2d section of the act.

No discussion of the 6th section of the act is necessary. If the transactions prior to 1903 did not violate the 2d section, they did not violate the 6th section.

We come now to a consideration of the 3d section of the act. This section forbids any common carrier, subject to the provisions of the act, to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any
239 particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. It is quite clear that this language is so broad that, by merely becoming a vendor of the articles carried, the carrier does not escape the inhibitions of the 3d section. If any undue advantage is given anyone, or any undue prejudice is caused anyone, by the transactions of a carrier involving

carriage, this statute forbids such transactions. This section is not confined to advantage or prejudice caused by carriage at a rate less than the published rate.

We are now, therefore, brought to consider if the transactions in question, prior to 1903, either gave some one an undue advantage or caused some one an undue prejudice in any respect whatsoever. From the cross-examination of Mr. Hotchkiss it appears that coal "destined beyond the Capes" means coal going to New York or to New England. In the 6th clause of the agreed facts is an admission which seems to be capable of no fair construction other than that some coal from the West Virginia mines went in cargo lots during the period in question to New York or New England consumers other than the New Haven Company. It is possible that such consumers in fact paid no more for the coal than the New Haven Company was paying; but, if so, either some coal operator, or some coal dealer, or some water carrier, suffered a comparative loss. For on all the coal going to other consumers the full published tariff rate of the C. & O. was charged and collected. If the consumers of the coal, other than that going to the New Haven Company, paid as much to the coal producers as the C. & O. paid, and paid as much to the water carriers as the C. & O. paid, and paid full freight rates to the C. & O., it is evident that such consumers had to pay more for their coal than the New Haven Company was paying. If, on the other hand, such
240 consumers paid no more for their coal than the New Haven Company then either some coal producer received less than did the producers of the coal going to the New Haven Company, or some water carrier received less, or some coal dealer suffered the loss. I can not, from the evidence, say just who suffered this comparative prejudice, but it is sufficient if any one did. The 3d section is very comprehensive and broad. A prejudice to any one, in any respect, is forbidden. It is also to be noted that this section is in the disjunctive. It is not necessary to the application of the statute that there be both an advantage to the carrier's vendee and a prejudice to some one else. If either result is caused by the transaction in question, the statute applies. It may be said that, so far as the evidence shows, this other coal may have been sold by the C. & O., and at the same low price as that received from the New Haven Company. But if this be true, the fact was peculiarly within the knowledge of the C. & O. and should have been proved by it. It may further be said that the prejudice here may have been suffered only by some New York or New England consumers, and that there is no evidence that such consumers were competitors of the New Haven Company. But I find no such limitation in the 3d section. Prejudice to any one is forbidden. Moreover, the question of the intent of the parties is not involved. It is generally true, especially as to common-law offences, that there must be both the act and the criminal intent in order to constitute a crime. But where a statute forbids an act to be done, the

offence is committed by doing the act regardless of the intent. So, also, want of knowledge by the purchaser that the carrier's contract is, or has become, illegal is immaterial. The letter of the law and the policy of the law, for the public good, demand that such a contract shall not be performed. I have never heard that the courts can refuse to
241 enforce a law because a party to a contract made in violation of law is ignorant that the law is being violated. It is also to be observed that this section applies as much to an unexpected advantage or prejudice, not contemplated by either party at the inception of the contract, as it does to an advantage given or prejudice caused with clear intent to violate the statute.

Of course, some very slight advantage or prejudice is not forbidden. It must be "undue" or "unreasonable." I am fully convinced that if a carrier-vendor makes a contract such as we have here under consideration at a time when the contract price will pay, or will practically pay, all cost items and the published freight rate of the carrier, such contract does not become illegal if, for reasons beyond the carrier's control, the cost items rise somewhat, if not too much, above the prices prevailing when the contract was made. But the very gist of the case lies in the amount of this increase in the cost items. The standard by which to determine when an advantage to one or a prejudice to some other is undue or unreasonable is not difficult to determine. Whenever it is sufficient in amount to be substantial and of importance to either the one receiving the advantage or to the one suffering the prejudice it must be held to be undue or unreasonable. In the case at bar we should properly consider that the difference between the price received by the C. & O. and the aggregate of cost items and its published freight rates is to be treated as a loss suffered as dealer (but by one required to collect its full freight rates). Upon making the calculation, we find that the loss was $301,959.13 on the actual deliveries made prior to 1903, and that there was a further loss of at least $130,000 because of failure to make deliveries during the period in question. The total loss being $431,959.13, there was an aver-
age loss of over 23 cents per ton on the actual deliveries. I can
242 not escape the conclusion that this advantage to the New Haven Company, or prejudice to some or all of those concerned with the other coal that went to New York or New England from the West Virginia mines, is sufficient in amount to be substantial and of importance.

While a carrier may become a dealer in articles of transport, and can sell (and consequently can contract to sell) such articles at a price which pays, or practically pays, the cost items and its own published freight charges, yet whenever the cost items so substantially rise that the loss to the carrier (as a dealer) and the subsequent advantage to the purchaser-consignee, or the disadvantage to some one else, becomes unreasonable or undue, such sales become (or such contract becomes) illegal. When

such a state of fact comes to exist the carrier must plead the illegality of the transaction and cease to perform.

It is not an answer to the foregoing to say that the losses of a carrier-dealer may be treated as losses on its account as a dealer. If there is a loss (no matter to which of the carrier's accounts it is charged), there is, under evidence such as we have here, either an advantage to the purchaser or a disadvantage to some one else equal to this loss. If we give an ordinary and reasonable meaning to the language of the 3d section of the act, every conceivable case of preference or advantage given by a carrier to one person, or of prejudice caused to be suffered by some one else, is forbidden.

The conclusion I have reached gives a carrier a right to cease to perform contracts made in good faith whenever the cost of the article or the other cost items go to such a point that the contract price does not equal (or practically equal) the cost items and the carrier's published freight rates. This may occasionally result in great hardship to the car-
243 rier's vendee. But the books abound in closely analogous cases, where shippers who obtained by honest mistake on the part of the railroad agents an agreement for carriage at less than schedule rates, have been held without remedy when the carrier refused to abide by the contract and insisted on the full tariff rate. (Chicago R. Co. vs. Hubbell, 38 Pac., 266; Bundick vs. Savannah R. Co., 21 S. E., 995; Missouri R. Co. vs. Bowles, 40 S. W., 899; Houston R. Co. vs. Dumas, 43 W., 609; San Antonio R. Co. vs. Clements, 49 S. W., 913; Missouri R. Co., vs. Stoner, 23 S. W., 1,020; Gulf R. Co. vs. Hefley, 158 U. S., 99; Southern R. Co vs. Harrison, 24 So., 553; Southern R. Co. vs. Wilcox, 99 Va., 394; Bullard vs. N. P. R. Co., 45 Am. & Eng. R. R. Cases, 234.) The interest of the many in having carriers required to observe the provisions of the interstate commerce act, far outweigh the interests of the few who make contracts with carriers which can not be performed except by violating the act.

Having reached the conclusion that there was here an undue preference or an undue prejudice, it follows that the demand made by the New Haven Company in April, 1903, for $103,000 damages for breach of the contract of 1896, was a demand for damages for a failure to perform an illegal contract. The law does not allow damages for a failure or refusal to do an act which the law forbids to be done. The demand of the New Haven road was therefore an illegal and unenforceable demand.

I do not discuss some very interesting questions that might arise under the construction I have given the 3d section of the commerce act. Could a vendor-carrier voluntarily legalize, or be compelled to legalize, performance of a contract of sale and carriage which has become illegal by reason of an advance in cost items by reducing, or being required
244 to reduce, its published freight rates? As the C. & O. has not

offered to do this, and as the New Haven Company has not asked cross-relief, this question is not presented in the case.

Again, could a carrier-vendor render illegal the performance of a contract, which otherwise it could legally perform, by increasing its published freight rate on the article contracted to be carried and sold by it? This question also is not here involved. While reasons occur to me leading to the belief that performance of such contract could neither be legalized nor rendered illegal by the methods suggested, a discussion of these questions would be purely by the way and would unnecessarily add to an opinion which is already of too great length.

In regard to the transactions of 1903, it is unnecessary, so far as we are concerned merely with the commerce act, to determine whether the C. & O. was the vendor of the coal or merely the carrier. If it was the vendor, its acts were illegal for the reasons given above (as it appears, record, p. 33, that the published rate of $1.45 was, in 1903, collected on other Kanawha coal); and if it is to be considered merely as a carrier, its acts were also illegal, for it was carrying the coal at less than its published tariff, and its excuse that in so doing it was merely paying a debt due its creditor, the New Haven Company, cannot avail. This demand is an illegal and unenforceable claim. Under such facts, the case of Union Pacific vs. Goodridge, supra, governs us. However, in view of a possible construction of the 3d clause of the "Elkins Act" (32 Stats., 847), it is necessary to determine whether the C. & O. was the vendor of the coal to be delivered under the verbal agreement of April, 1903, or was merely the carrier thereof. If the C. & O. was merely the carrier, and hence was carrying at less than its published rates, it is contended
245 that the Elkins Act requires that an "omnibus" injunction be issued requiring that the C. & O. observe it published tariffs in respect to all cariage for all persons. If, on the other hand, a mere case of undue advantage or disadvantage, created otherwise than by a rebate on rates, is made out, it is admitted that a mere injunction against the continuance of the particular transaction proved is all that should be awarded.

I have, therefore, carefully considered the record to learn, if possible, the true nature of the verbal agreement of April, 1903. The answers of both the defendants, the testimony of Mr. Stevens before the Commission, and the affidavit of Mr. Hall show, I think, that the C. & O. was in fact the vendor of the coal to be delivered under the verbal agreement. The affidavit of J. R. Thomas might lead to some doubt on this point, except for the explanation of his statement found in the papers above referred to. The C. & O. employed certain agents in the transaction, but in fact and in legal contemplation it was the vendor of the coal. It was simply continuing the performance of the incomplete contract of 1896, delivering Kanawha coal at the former contract price; and the advantage to the New Haven Company, or the prejudice to some one or all the persons concerned with other Kanawha coal was, in 1903, very great

because the C. & O. was receiving for the coal delivered in 1903 more than a dollar per ton less than the aggregate of the cost items and its published freight rate, the loss being over $40,000 on the 38,078 tons delivered in 1903. (See tables 1 and 2, ante.) And it is no avail to ask that we treat this loss as a payment of an indebtedness theretofore incurred. This indebtedness, not being a valid and enforceable claim, can not be treated as if it were such.

246 From what has been said, it follows that it is not necessary to construe the Elkins Act as applicable to a case of carriage at less than published rates. The case at bar is merely one of discrimination brought about by transactions that can not, as I think, be properly treated as a violation of the 2d section of the commerce act, but which must be treated as a violation of the 3d section of that act. The order should, therefore, merely enjoin the further performance of the agreement between the defendants.

HENRY C. McDOWELL,
District Judge.

And at another day, to wit: At a term of the circuit court of the United States for the western district of Virginia, continued and held at Lynchburg, on Friday, the 19th day of February, 1904.

HENRY C. McDOWELL.
District Judge.

Decree perpetuating injunction. Filed February 19, 1904.

INTER-STATE COMMERCE COMMISSION
vs.
C. & O. RWY. CO. & N. Y., N. H. & H. R. R. Co.

This cause having been argued by counsel, and the record and said arguments having been considered, for reasons set out in a written opinion now filed it is adjudged, ordered, and decreed:

(1) That the claim of the New York, New Haven and Hartford Railroad Company against the Chesapeake and Ohio Railway Company for $103,910.69, asserted as damages arising from the partial non-
247 formance by said railway company of the contract of December 3rd, 1896, set out in the record, is, as to the whole of said claim and as to interest thereon, an illegal and unenforceable claim.

(2) That the verbal agreement between said companies, made in April, 1903, and set out in said record, whereby said railway company undertook to furnish to said railroad company 59,966 tons of coal, to be transported from West Virginia to Newport News, Virginia, over the line of said railway company, and thence transported by vessel to certain New England ports, said coal to be delivered at said ports at the price of $2.75 per ton, New Haven basis, is an invalid and illegal agreement.

(3) That the said Chesapeake and Ohio Railway Company, and all its officers, agents, and employees be, and they are hereby perpetually enjoined and restrained from, in any manner, direct or indirect, executing or performing, or attempting to execute or perform, either the said contract of 1896, or said agreement of April, 1903, and from in any manner discharging or satisfying any obligation, or seeming obligation, arising from said agreements, or either of them, or arising from any agreement or arrangement made in lieu of said agreements, or either of them.

(4) That said New York, New Haven and Hartford Railroad Company, and all its officers, agents, and employees be, and they are hereby perpetually restrained and enjoined from demanding, or seeking the enforcement of, in any manner, the payment of all or of any part of its above-mentioned claim of $103,910.69, or of any interest thereon, or from accepting, directly or indirectly, payment or satisfaction in any form of all or any part of said claim, or interest thereon. And they are also enjoined and restrained from enforcing, or attempting to enforce, in any manner whatever, directly or indirectly, the aforesaid verbal
248 agreement of April, 1903, and from accepting, directly or indirectly, any performance, partial or entire, of said agreement, or any payment or other satisfaction either in lieu of performance, or as damages for nonperformance.

(5) That the defendants herein each pay its own costs herein incurred, and that the Chesapeake and Ohio Railway Company pay the costs in this behalf incurred by or for the complainant, the Interstate Commerce Commission.

Enter: Feby. 19, 1904.

HENRY C. McDOWELL,
District Judge.

Supplemental opinion of the court. Filed February 19, 1904.

INTERSTATE COMMERCE COMMISSION
vs.
C. & O. RWY. CO. AND N. Y., N. H. & H. R. CO.

Since the entry of the order of Feby. 19, 1904—the term of court not yet being ended—a motion has been made by the complainant that the injunction be enlarged. Upon argument of this motion, the point principally discussed was the contention by the complainant that the C. & O. was not the vendor of the coal covered by the agreement of April, 1903. I have reexamined the record as to this point, but I am not able to change my opinion on this question. The agreement made in April, 1903, was verbal. Both Messrs. Hall and Stevens agree that the new arrangement was, except that Kanawha coal was substituted for New River coal, that the C. & O. should complete the contract of 1896. That

contract was, as I think, one of sale as well as carriage. In substance and in intent, in making the verbal arrangement of 1903, the
249 C. & O. sold the coal to the New Haven company, delivered at New York and New England ports. The Kanawha Fuel Company had no contract with the New Haven company. The C. & O. Coal Agency Company had no contract with the New Haven company. Both companies contracted with the C. & O. There is not a suggestion in the record that the C. & O. acted as the agent of the New Haven company. As the C. & O. contracted to sell the coal to the New Haven company delivered, and as the New Haven company never authorized the C. & O., as the agent of the New Haven company, to make a contract between the latter and any coal producer, it seems to me that in truth and in legal effect the C. & O. was simply buying the coal from Mr. Thomas' company. The Kanawha Fuel Company certainly agreed to sell coal to some one. A contract to sell of necessity implies a contract by some one to buy. Now, the party who contracted to buy was either the C. & O. or the New Haven company. Since the latter did not directly contract to buy coal from the Kanawha Fuel Company, and did not authorize the C. & O. to act as its agent, it seems to follow that the C. & O. was the purchaser.

The addition to the decree asked for by complainant is that the C. & O. be perpetually enjoined from transporting coal for anyone at less than its established rates. The third section of the Elkins Act, as I read it, does not authorize such an order, except where the court finds that the carrier is violating the law by carrying at less than its published rates. If the discrimination is otherwise caused, the act only authorizes an order requiring a discontinuance of such discrimination.

At this hearing it was argued by counsel for the defense that the court had found the C. & O. guilty of an offense not charged in the
250 petition. It will be found that the petition charges that the C. & O. "is engaged in carrying freight * * * at less than its published rates on file, and is committing a discrimination forbidden by law." Again "Petitioner * * * charges that the Chesapeake and Ohio Railway Company in this transaction is engaged in the carriage of freight * * * at less than its published rates * * * and is committing a discrimination against all other coal produced in the Kanawha district * * * *." As an exhibit with the petition is filed Mr. Stevens' testimony before the Commission, in which he says: "On all coal shipments from the Kanawha district, the rate of $1.45 is being charged and collected * * * *." The 3d section of the commerce act forbids that any "particular description of traffic" be subjected to an undue or unreasonable prejudice or disadvantage. Traffic can be subjected to a disadvantage only when some or all of the persons concerned with such traffic are subjected to disadvantage. If either the producers

of, or the water carriers of, or the consumers of, the Kanawha coal which went to New York or New England for others than the New Haven company, suffered a disadvantage, then this traffic suffered such disadvantage. I am inclined to think that the use of the expression "any particular description of traffic" is sufficient to show that it is not necessary for the complainant either to allege the names of the persons thus prejudiced, or to prove who the particular persons are. Having found that some or all of the persons concerned with the Kanawha coal destined for points "beyond the Capes" other than that for the New Haven company, were subjected to an undue disadvantage, it follows that I have found that this particular traffic has been subjected to such disadvantage. Finding this to be one of the offenses charged in the
251 petition, and finding evidence to sustain the charge, I can not hold that the defendants have been convicted of an offense with which they were not charged or of which they had no notice.

The best conclusion I can reach is that the motion of the complainant to enlarge the injunction should be overruled, and that the decree of Feby. 19, 1904, be allowed to stand in its present form.

March 14, 1904.

HENRY C. MCDOWELL,
District Judge.

And now at this day, to wit: At a term of the circuit court of the United States for the western district of Virginia, continued and held at Lynchburg, on Monday, the 14th day of March, 1904.

HENRY C. MCDOWELL,
District Judge.

Decree overruling motion to enlarge injunction. Filed March 14, 1904.

INTERSTATE COMMERCE COMMISSION
vs.
THE CHESAPEAKE & OHIO RAILWAY COMPANY and the New York, New Haven & Hartford Railroad Company.

This cause coming on again during this, the September, 1903, term, to be heard on a motion by complaint that the order of February, 1904, be enlarged, was argued by counsel. Upon consideration thereof, for reasons stated in a supplemental opinion now filed, it is ordered that said motion be, and it is hereby, overruled, and that the costs accruing on said motion be paid by the complainant.

Enter: March 14, 1904.

HENRY C. MCDOWELL,
District Judge.

252 *Appeal proceedings. Notice of joinder or severance. Filed March 18, 1904.*

The circuit court of the United States for the western district of Virginia.

INTERSTATE COMMERCE COMMISSION, COMPLAINANT,
vs.
CHESAPEAKE & OHIO RAILWAY COMPANY AND NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY, defendants. } In equity.

To the Chesapeake & Ohio Railway Company:

You are hereby invited to join with the New York, New Haven & Hartford Railroad Company on or before the 18th day of March next, to prosecute an appeal in the above-entitled cause to the United States Supreme Court to reverse the judgment and decree rendered against us jointly on the nineteenth day of February last, or you will be deemed to have aquiesced in said judgment, and the New York, New Haven & Hartford Railroad Company will prosecute said appeal without joining you as a party.

JOHN W. GRIGGS,
DANIEL & HARPER,
Attorneys of New York, New Haven & Hartford Railroad Company.

Service of the within notice accepted.

CHESAPEAKE & OHIO RAILWAY CO.,
By HARRISON & LONG, *Attorneys.*

MARCH 18TH, 1904.

253 *Petition of appeal. Filed March 18, 1904.*

The circuit court of the United States for the western district of Virginia.

INTERSTATE COMMERCE COMMISSION, COMPLAINANT,
vs.
CHESAPEAKE & OHIO RAILWAY COMPANY, AND NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY, defendants. } In equity.

The New York, New Haven & Hartford Railroad Company, one of the defendants in the above-entitled cause, conceiving itself aggrieved by the decree made and entered therein on the nineteenth day of February, one thousand nine hundred and four, does hereby appeal from said order and decree to the Supreme Court of the United States, for the reasons specified in the assignment of errors, which is filed herewith, and

prays that this appeal may be allowed, and that a transcript of the record, proceedings, and papers upon which said order was made, duly authenticated, may be sent to the Supreme Court of the United States.

JOHN W. GRIGGS,
DANIEL & HARPER,
Attorneys for defendant, New York, New Haven & Hartford Railroad Company.

Dated this —— day of March, 1904.
The foregoing claim of appeal is allowed.
Dated March 18th, 1904.

HENRY C. McDOWELL,
District Judge.

254 *Assignment of errors. Filed March 18, 1904.*

The circuit court of the United States for the western district of Virginia.

INTERSTATE COMMERCE COMMISSION, COMPLAINANT,
vs.
CHESAPEAKE & OHIO RAILWAY COMPANY, AND NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY, defendants. } In equity.

The defendant, New York, New Haven & Hartford Railroad Company, prays an appeal from the final decree of this court to the Supreme Court of the United States, and assigns for error:

First. That the said circuit court of the United States for the western district of Virginia erred in adjudging, ordering, and decreeing that the claim of the New York, New Haven & Hartford Railroad Company against the Chesapeake & Ohio Railway Company for $103,910.69, asserted as damages arising from the partial nonperformance by said railway company of the contract of December 3d, 1896, set out in the record, is, as to the whole of said claim, and as to interest thereon, an illegal and unenforceable claim.

Second. That the said court erred in adjudging, ordering, and decreeing that the verbal agreement between said companies, made in April, 1903, and set out in said record, whereby said railway company undertook to furnish to said railroad company 59,966 tons of coal, to be transported from West Virginia to Newport News, Virginia, over the line of said railway company, and thence transported by vessel to certain New
255 England ports, said coal to be delivered at said ports at the price of $2.75 per ton, New Haven basis, is an invalid and illegal agreement.

Third. That the said court erred in adjudging, ordering, and decreeing that the said Chesapeake & Ohio Railway Company, and all its officers,

agents, and employees, be, and they are hereby perpetually enjoined and restrained from in any manner, directly or indirectly, executing or performing, or attempting to execute or perform, either the said contract of 1896, or said agreement of April, 1903, and from in any manner discharging or satisfying any obligation, or seeming obligation, arising from said agreements, or either of them, or arising from any agreement or arrangement made in lieu of said agreements, or either of them.

Fourth. That the said court erred in adjudging, ordering, and decreeing that said New York, New Haven & Hartford Railroad Company, and all its officers, agents, and employees, be, and they are hereby, perpetually restrained and enjoined from demanding, or seeking the enforcement of, in any manner, the payment of all or of any part of its above-mentioned claim of $103,910.69, or of any interest thereon, or from accepting, directly or indirectly, payment or satisfaction in any form of all or any part of said claim, or interest thereon. And they are also enjoined and restrained from enforcing or attempting to enforce, in any manner whatever, directly or indirectly, the aforesaid verbal agreement of April, 1903, and from accepting, directly or indirectly, any performance, partial or entire, of said agreement, or any payment or other satisfaction, either in lieu of performance, or as damages for nonperformance.

Fifth. That the said court erred in not dismissing the complaint of the complainant in said cause.

256 Sixth. That said court erred in holding that the facts proven in said case constituted any violation of the third section of the interstate commerce act.

Seventh. That the interpretation put upon the language of the third section of the interstate commerce act by the said court in its opinion and decree is erroneous and unjust to the said appellant, and the appellant is not in the complaint in this case alleged to have violated the said section or any of the provisions thereof.

Eighth. That the said court erred in holding and deciding that the complaint duly alleged and charged that an offence had been committed by the appellant against the provisions of the third section of the interstate commerce act, and in finding that there was evidence to sustain such charge.

Ninth. That the said decree is in other respects erroneous and unjust to this appellant.

Wherefore the appellant prays that the decree of the said circuit court be reversed.

JOHN W. GRIGGS,
DANIEL & HARPER,
Attorneys for New York, New Haven & Hartford Railroad Company, Appellant.

257 *Order allowing appeal. Filed March 18, 1904.*

In the circuit court of the United States for the western district of Virginia.

INTERSTATE COMMERCE COMMISSION, COMPLAINANT,
vs.
CHESAPEAKE & OHIO RAILWAY COMPANY AND NEW York, New Haven and Hartford Railroad Company, defendants. } In Equity.

Comes now the New York, New Haven and Hartford Railroad Company, one of the defendants in this cause, and files his petition, praying an appeal to the United States Supreme Court from a decree of this court entered herein on the 19th day of February, 1904, and also files his assignment of error.

On consideration whereof, the court doth allow said appeal on the said New York, New Haven and Hartford Railroad Company, or some one for it, executing an appeal bond, with good and sufficient surety, in the sum of five hundred dollars ($500.00).

March 18th, 1904.

HENRY C. McDOWELL,
District Judge.

258 *Appeal bond. Filed March 18, 1904.*

United States circuit court for the western district of Virginia.

INTERSTATE COMMERCE COMMISSION, PETITIONER,
vs.
CHESAPEAKE & OHIO RAILWAY COMPANY AND NEW York, New Haven & Hartford Railroad Company, defendants.

Know all men by these presents: That The American Surety Company, a corporation duly organized and existing under the laws of the United States, and with full power to execute this obligation, is held and firmly bound to the Interstate Commerce Commission in the sum of five hundred dollars ($500) for which payment, well and truly to be made, the said The American Surety Company does hereby bind itself and its successors firmly by these presents.

Whereas in the above-entitled cause a final decree was rendered and entered in said circuit court on the nineteenth day of February, A. D. 1904, in favor of the Interstate Commerce Commission and against the said defendants, and the New York, New Haven & Hartford Railroad Company, one of said defendants, has prayed an appeal therefrom to the Supreme Court of the United States.

Now, therefore, the condition of this obligation is such that if the said defendant, the New York, New Haven & Hartford Railroad Company, shall prosecute its appeal with effect and answer all damages and
259 costs if it fail to make its plea good, then this obligation to be void, otherwise to remain in full force and effect.

In witness whereof the said American Surety Company has caused this obligation to be signed by its vice-president and attested by its attorney in that behalf severally duly authorized, and its corporate seal to be hereto affixed, this sixteenth day of March, A. D. 1904.

[Seal of American Surety Company.] AMERICAN SURETY COMPANY OF NEW YORK,
By DAVID B. SICKELS, *Vice-President.*

Attest:

CORTLANDT S. VAN RENSSELAER,
Attorney.

March 18, 1904.
Approved:

HENRY C. MCDOWELL,
District Judge.

STATE AND COUNTY OF NEW YORK, *ss:*

On this 16th day of March, 1904, before me personally appeared David B. Sickels, vice-president of the American Surety Company of New York, to me known, who, being by me duly sworn, did depose and say that he resided in the city of New York; that he is the vice-president of the American Surety Company of New York, the corporation described in and which executed the above instrument; that he knew the corporate seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order; and that the liabilities of said corporation do not
260 exceed its assets, as ascertained in the manner provided by law.

And the said David B. Sickels further said that he was acquainted with Cortlandt S. Van Rensselaer, and knew him to be one of the attorneys of said corporation; that the signature of said Cortlandt S. Van Rensselaer, subscribed to the said instrument, is in the genuine handwriting of the said Cortlandt S. Van Rensselaer, and was thereto subscribed by the like order of the said board of directors and in the presence of him, the said David B. Sickels, vice-president.

[Seal of notary public.] JARED F. HARRISON, Jr.,
Notary Public, New York County.

At a regular quarterly meeting of the board of trustees of the American Surety Company of New York held on the 12th day of April, 1893, the following resolution was adopted, and is still in force:

"*Resolved*, That the president and vice-presidents be, and they hereby are and each one of them is, authorized and empowered to execute and deliver and attach the seal of the company to any and all bonds and undertakings for or on behalf of the company in its business of guaranteeing the performance of contracts other than insurance policies, and executing or guaranteeing bonds and undertakings required or permitted in all actions or proceedings by law allowed; such guarantee, bonds, and undertakings, however, to be attested in every instance by the secretary, one of the assistant secretaries, or one of the attorneys."

COUNTY OF NEW YORK, *ss:*

I, Cortlandt S. Van Rensselaer, attorney of the American Surety Company of New York, have compared the foregoing resolution with
261 the original thereof, as recorded in the minute book of said company, and do certify that the same is a correct and true transcript therefrom, and of the whole of said original resolution.

Given under my hand and the seal of the company at the city of New York, this 16th day of March, 1904.

[Seal of American Surety Company.]

CORTLANDT S. VAN RENSSELAER,
Attorney.

Citation. Filed March 18, 1904.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Interstate Commerce Commission, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at the city of Washington, within thirty days from the date of this writ, pursuant to an appeal duly allowed by the circuit court of the United States for the western district of Virginia and filed in the clerk's office in said court on the 18th day of March, A. D. 1904, in a cause wherein the New York, New Haven & Hartford Railroad Company is appellant and you are appellee, to show cause, if any, why the decree rendered against the said appellant, as in said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 18th day of March, A. D. 1904.

HENRY C. MCDOWELL,
U. S. District Judge, Western District of Va.

Legal service of the above citation is hereby acknowledged.

MARTIN S. DECKER,
Assistant Secretary of the Interstate Commerce Commission.

262 *Stipulation of parties as to transcript of record. Filed April 14, 1904.*

In the United States circuit court for the western district of Virginia.

INTERSTATE COMMERCE COMMISSION
vs.
THE CHESAPEAKE AND OHIO RAILWAY Company, and The New York, New Haven and Hartford Railroad Company.

Stipulation of the parties to appeal as to what shall constitute the record on said appeal.

An order in the above-entitled cause having been entered allowing an appeal to the New York, New Haven and Hartford Railroad Company, and the parties hereto desiring to obviate the expense of a duplication of printing already done in preparing a record for the convenience of the circuit court and the counsel in the cause, it is hereby stipulated and agreed by the New York, New Haven and Hartford Railroad Company and the Interstate Commerce Commission that the clerk of the said circuit court be requested to certify to the Supreme Court of the United States, as a record in this cause, the following:

1. The printed record used in the cause at the hearing.
2. The cross-examination of E. D. Hotchkiss taken before the court on December 1st, 1903.
3. Copies of accounts of sales of coal during May, 1902, rendered by the Chesapeake and Ohio Coal Agency Company to the Chesapeake and Ohio Railway Company.
4. Opinion of Judge McDowell, filed February 19th, 1904.
5. Decree, filed February 19th, 1904.
6. Supplemental opinion of Judge McDowell, filed March 14th, 1904.
7. Decree, filed March 14th, 1904.

263 It is further stipulated and agreed that the clerk of the United States Supreme Court shall be requested, in printing the record for use in his court, to use copies of the printed record in the circuit court as used at the hearing, the same to be furnished him by the New York, New Haven and Hartford Railroad Company.

Witness our hands this the 5th day of April, 1904.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,
By DANIEL & HARPER, *Its Attorneys.*
INTERSTATE COMMERCE COMMISSION,
By THOS. L. MOORE, *U. S. Atty.*
WM. A. GLASGOW, Jr., *Special U. S. Attorney.*

Order for transcript of record.

And thereupon, it is ordered by the court here that a transcript of the record and proceedings in the cause aforesaid, together with all things thereto relating, be transmitted to the Supreme Court of the United States, and the same is transmitted accordingly.

Teste:

WM. MCCAULEY, *Clerk.*

264 *Clerk's certificate.*

UNITED STATES OF AMERICA,
Western district of Virginia, ss:

I, William McCauley, clerk of the circuit court of the United States for the western district of Virginia, at Lynchburg, do hereby certify that the foregoing is a true and complete transcript of the record and proceedings in the cause in the caption mentioned, now of record and on file in my said office.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Lynchburg, in said district, this 14th day of April, in the year of our Lord nineteen hundred and four, and in the 128th year of the Independence of the United States of America.

[SEAL.]

WM. MCCAULEY,
Clerk of the Circuit Court of the United States for the Western District of Virginia.

265 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Interstate Commerce Commission, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at the city of Washington, within thirty days from the date of this writ, pursuant to an appeal duly allowed by the circuit court of the United States for the western district of Virginia, and filed in the clerk's office in said court on the 18th day of March, A. D. 1904, in a cause wherein the New York, New Haven & Hartford Railroad Company is appellant and you are appellee, to show cause, if any, why the decree rendered against the said appellant, as in said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 18th day of March, A. D. 1904.

HENRY C. MCDOWELL,
U. S. District Judge, Western District of Va.

Legal service of the above citation is hereby acknowledged.

MARTIN S. DECKER,
Assistant Secretary of the Interstate Commerce Commission.

266 (Indorsed:) U. S. circuit court, western district of Virginia. Interstate Commerce Commission, petitioner, *vs.* The Chesapeake & Ohio Ry. Co. & The N. Y., N. H. & H. R. R. Co., defendants. Citation on appeal. John W. Griggs, Daniel & Harper, Attys. of N. Y., N. H. & H. R. R. Co. Filed March 18, 1904. Wm. McCauley, clerk. Office of the clerk Supreme Court U. S. Received Apr. 22, 1904.

267 Transcript of Record of appeal proceedings on the petition of the Interstate Commerce Commission for an appeal from decrees entered in the cause in equity lately depending in the circuit court of the United States for the western district of Virginia, at Lynchburg, in which the said Interstate Commerce Commission was complainant, and the Chesapeake and Ohio Railway Company and the New York, New Haven and Hartford Railway Company were defendants.

Petition for appeal. (*Filed April 16, 1904.*)

Circuit court of the United States for the western district of Virginia.

INTERSTATE COMMERCE COMMISSION, COMPLAINANT,
vs.
CHESAPEAKE & OHIO RAILWAY COMPANY AND NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY, defendants. } In equity.

The Interstate Commerce Commission, complainant in the above-styled cause, conceiving itself aggrieved by the decree made and entered therein on the 19th day of February, one thousand nine hundred and four, and also by the decree entered therein on the 14 day of March, one thousand nine hundred and four, does hereby appeal from said order and decrees to the Supreme Court of the United States, for the reasons specified in the assignment of errors which is herewith filed, and prays that this appeal may be allowed, and that a transcript of the record, proceedings, and papers upon which said order was made, duly authenticated,
268 may be sent to the Supreme Court of the United States.

For the Interstate Commerce Commission:

THOS. L. MOORE,
United States Atty.
and WM. A. GLASGOW, Jr.,
Special Assistant Atty.

Dated this 15 day of April, 1904.

The foregoing claim of appeal is allowed.
Dated April 16, 1904.

HENRY C. McDOWELL,
District Judge.

269 *Assignment of errors.* (*Filed April 16, 1904.*)

Circuit court of the United States for the western district of Virginia.

INTERSTATE COMMERCE COMMISSION, PLAINTIFF,
vs.
CHESAPEAKE & OHIO RAILWAY COMPANY AND New York, New Haven & Hartford Railroad Company, defendants. } In equity.

The plaintiff, the Interstate Commerce Commission, prays an appeal from the final decrees of this court, entered in the above-styled cause on the 19th day of February, 1904, and the 14 day of March, 1904, to the Supreme Court of the United States, and assigns for error:

1. That the circuit court of the U. S. for the western district of Virginia, after finding that the claim of the New York, N. H. & H. R. R. Co. against the C. & O. Ry. Co. for $103,910.69, asserted as damages arising from a partial nonperformance by said railway company of a contract of December 3rd, 1896, set out in the record, is, as to the whole of said claim and interest thereon, an illegal and unenforceable claim, and after finding that the verbal agreement between said companies, made in April, 1903, and set out in said record, whereby said railway company undertook to furnish to said railroad company 59,966 tons of coal, to be transported from West Virginia to Newport News, Virginia, over the lines of said railway company, and thence transported by vessels to certain New England ports, said coal to be delivered at said ports at the
270 price of $2.75 per ton, New Haven basis, to be an invalid and illegal agreement; that said court merely enjoined and restrained the said C. & O. Ry. Co., its officers, agents, and employés from, in any manner, direct or indirect, executing or performing or attempting to execute or perform either said contract of December 3, 1896, or said agreement of April, 1903, and from in any manner discharging or satisfying any obligation or seeming obligation arising from said agreements or either of them, or arising from any arrangement or agreement made in lieu of said agreements, or either of them; whereas said court should have further enjoined and restrained the C. & O. Ry. Co. from giving to said railroad company, or to any other person, firm, or company, any undue or unreasonable advantage or preference, and should further have restrained and enjoined the C. & O. Ry. Co. from transporting coal from one State to or through any other State for the New York, New Haven & Hartford

Railroad Company, or for any firm, person, or company, at a less rate than the duly established freight rate of the said railway company in force at the time, and from further failing to observe its published tariffs, or from giving to the said N. Y., N. H. & H. R. R. Co., or to any person, firm, or company, in any manner whatsoever, any undue or unreasonable preference or advantage, and said decree entered by the court on the 19th day of February, 1904, in addition to the provisions thereof, should have enjoined and restrained the N. Y., N. H. & H. R. R. Co. and its officers and agents from seeking or accepting in any manner any direct or indirect rebate of the duly established freight rates of the C. & O. Ry. Co. on any interstate commerce, and from seeking or accepting in any manner from said railway company any undue or unreasonable preference or advantage.

2. And whereas on the 4th day of March, 1904, the complainant,
271 the Interstate Commerce Commission, moved the said court to amend the order entered in the above cause on the 19th day of Feby., 1904, by inserting the following paragraph:

And the defendant, the C. & O. Ry. Co., is restrained and enjoined from transporting coal from one State to, into, or through any other State for the N. Y., N. H. & H. R. R. Co., or for any other person, firm, company, or corporation, at a less rate than the duly established freight rate of the said C. & O. Ry. Co., in force at the time, and filed with the Interstate Commerce Commission.

And whereas, the court, by order, entered herein on the 14 day of March, 1904, overruled the complainant's motion, and declined to change or amend the order entered herein as aforesaid on the 19th day of February, 1904, it is assigned as error that the said modification of the order of the 19th of Feby., 1904, should have been made by the court herein.

3. It is further assigned as error that the court found that the loss made by the C. & O. Ry. Co. from July 1st, 1897, to July 1st, 1902, in the transportation of the coal in the record set forth, by the C. & O. Ry. Co., for the N. Y., N. H. & H. R. R. Co., was a loss by the C. & O. Ry. Co. as a vendor of coal; whereas the court should have held that such loss occurred by reason of the C. & O. Ry. Co., charging to the N. Y., N. H. & H. R. R. Co., or to the shipper of said coal, less than the published tariff rates of the C. & O. Ry. Co. within and during said period, in force and duly filed as required by law.

4. That the court held that the loss by the C. & O. Ry. Co. in the transportation of coal for the N. Y., N. H. & H. R. R. Co., after April 1st, 1903, was a loss to the C. & O. Ry. Co. as vendor of said coal, whereas the court should have held that the loss to the C. & O. Ry. Co. was really a cut or rebate or departure from its established tariffs of
272 rates on coal, in effect during said period.

5. The court should have held that the contract between the C. & O. Ry. Co. and the N. Y., N. H. & H. R. R. Co. of December 3,

1896, was absolutely void and illegal, being in violation of the act to regulate commerce, and for failure to deliver coal thereunder, it should have been held that no liability could be successfully asserted against the C. & O. Ry. Co.

6. The court should have held that no legitimate claim for damages could be asserted against the C. & O. Ry. Co. for failure to deliver coal under the contract of Dec. 3, 1896, and that said contract was not binding on the said C. & O. Ry. Co.

7. The court should have held that the contract of Dec. 3, 1896, between the C. & O. Ry. Co. and the N. Y., N. H. & H. R. R. Co. was an option to the N. Y., N. H. & H. R. R. Co., to take within five years, any amount of coal which it may want, not to exceed two millions of tons, and not exceeding 400,000 tons per annum, and the court should have held further that the C. & O. Ry. Co. had the option on July 1, 1902, to cancel all portions of said quantity of coal remaining undelivered.

8. The court should have held that the C. & O. Ry. Co. was guilty of discrimination as defined in sec. 2 of the act to regulate commerce, in the carriage and delivery of the coal to the New York, New Haven & Hartford Railroad Company.

9. The court should have held that the C. & O. Ry. Co. violated the provisions of the act of Congress approved Feb. 19, 1903, in that it was engaged in the carriage of freight traffic between given points at less than its published rates on file, and that said railway company was committing a discrimination forbidden by law, and the court should have entered such an order as would have enforced, on the part of the
273 C. & O. Ry. Co., an observance of its published tariffs, and should have directed and required of the C. & O. Ry. Co. a discontinuance of such discrimination; and the court should have made said order apply to the C. & O. Ry. Co. and to the N. Y., N. H. & H. R. R. Co., the latter being the party interested in the traffic.

Wherefore the plaintiff prays that the decree of the said circuit court in declining to amend said decree be reversed, and that the decree of Feby. 19, 1904, be amended and be made to conform to such an order as the circuit court aforesaid should have entered.

THOS. L. MOORE,
U. S. Attorney.

WM. A. GLASGOW, JR.,
Special Assistant Attorney for Plaintiff.

274 *Order allowing appeal.* (*Filed April 16, 1904.*)

In the circuit court of the United States for the western district of Virginia.

INTERSTATE COMMERCE COMMISSION, complainant,
vs.
CHESAPEAKE & OHIO RAILWAY COMPANY and New York, New Haven & Hartford Railroad Company, defendants. } In equity.

Comes now the Interstate Commerce Commission, complainant in the above cause, and files its petition, praying an appeal to the United States Supreme Court from decrees of this court entered herein on the 19th day of February, 1904, and 14 day of March, 1904, and also files its assignment of errors.

On consideration whereof, the court doth allow the said appeal.

HENRY C. MCDOWELL,
District Judge.

APRIL 16TH, 1904.

275 *Stipulation as to record.* (*Filed April 30, 1904.*)

In the circuit court of the United States for the western district of Virginia.

INTERSTATE COMMERCE COMMISSION
vs.
CHESAPEAKE & OHIO RAILWAY COMPANY and New York, New Haven & Hartford Railroad Co.

Stipulation of the parties on appeal.

It is agreed, on the part of the Chesapeake & Ohio Railway Company and the New York, New Haven & Hartford Railroad Company, that on the appeal of the Interstate Commerce Commission in the above styled cause, the same record in the Supreme Court of the United States may be used as is used on the appeal of the New York, New Haven & Hartford Railroad Company, with such additional papers as may have been filed on the appeal of the Interstate Commerce Commission.

April 26, 1904.

CHESAPEAKE & OHIO RAILWAY COMPANY,
By HARRISON & LONG, *Attorneys.*

NEW YORK, NEW HAVEN & HARTFORD R. R. CO.,
By DANIEL & HARPER, *Attorneys.*

INTERSTATE COMMERCE COMMISSION,
By WM. A. GLASGOW, JR., *Attorney.*

276 UNITED STATES OF AMERICA, *to wit:*

The President of the United States to Chesapeake & Ohio Railway Company & New York, New Haven & Hartford Railroad Company, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at the city of Washington within thirty days from the date of this writ, pursuant to an appeal duly allowed in the circuit court of the United States for the western district of Virginia, and filed in the clerk's office of said court on the 16" day of April, A. D. 1904, in a cause wherein the Interstate Commerce Commission is appellant and you are the appellees, to show cause, if any, why the decree rendered against said appellant, as in said appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Melville W. Fuller, Chief Justice of the United States, this 16th day of April, A. D. nineteen hundred and four.

HENRY C. MCDOWELL,
District Judge.

(Indorsed:) Interstate Commerce Commission vs. C. & O. R'way Co. et al. Citation on appeal. April 16, 1904, filed. W. M. Manzy, D. C.

277 UNITED STATES OF AMERICA, *to wit:*

The President of the United States to Chesapeake & Ohio Railway Company & New York, New Haven & Hartford Railroad Company, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at the city of Washington within thirty days from the date of this writ, pursuant to an appeal duly allowed in the circuit court of the United States for the western district of Virginia, and filed in the clerk's office of said court on the 16" day of April, 1904, in a cause wherein the Interstate Commerce Commission is appellant and you are the appellees, to show cause, if any, why the decree rendered against said appellant, as in said appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Melville W. Fuller, Chief Justice of the United States, this 16th day of April, A. D. nineteen hundred and four.

[SEAL.]

HENRY C. MCDOWELL,
District Judge.

A copy: Teste.

WM. MCCAULEY, *Clerk.*

Service of the above citation is hereby acknowledged.
April 19th, 1904.

NEW YORK, NEW HAVEN & HARTFORD R. R. Co.,
By DANIEL & HARPER, *Attys.*
CHESAPEAKE & OHIO RY. Co.,
By HARRISON & LONG, *Attys.*

(Indorsed:) Original. U. S. Cir. Ct. W. D. Va., Lynchburg. Interstate Commerce Commission vs. C. & O. Rway. Co. et al. Citation on appeal.

278 *Order for transcript of record.*

And thereupon it is ordered by the court here that a transcript of the record and proceedings, on the appeal of the Interstate Commerce Commission, in the cause aforesaid, together with all things thereto relating, be transmitted to the Supreme Court of the United States, and the same is transmitted accordingly.

Teste:

WM. MCCAULEY, *Clerk.*

Clerk's certificate.

UNITED STATES OF AMERICA,
Western district of Virginia, ss:

I, William McCauley, clerk of the circuit court of the United States for the western district of Virginia, do hereby certify that the foregoing is a true and complete transcript of the record relating to the appeal proceedings on the petition of the Interstate Commerce Commission for an appeal from decrees entered in the cause and the caption mentioned, now of record and on file in my said office.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Lynchburg, in said district, this 10th day of May, in the year of our Lord 1904, and in the 128th year of the Independence of the United States of America.

[SEAL.]

WM. MCCAULEY,
Clerk of the Circuit Court of the United States for the Western District of Virginia.

(Indorsement on cover:) File No., 19347. Western Virginia C. C. U. S. Term No., 254. The New York, New Haven and Hartford Railroad Company, appellant, vs. The Interstate Commerce Commission. Filed May 13, 1904. File No., 19358. Term No., 260. The Interstate Commerce Commission, appellant, vs. The Chesapeake and Ohio Railway Company & The New York, New Haven & Hartford Railroad Company. Filed May 16", 1904. File Nos., 19347 and 19358.

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FILE COPY.

Office Supreme Court U. S.
FILED
OCT 19 1905
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States.

OCTOBER TERM, 1905.

No. 24.

NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, APPELLANT,

v.

INTERSTATE COMMERCE COMMISSION, APPELLEE.

1. The Interstate Commerce Act is concerned only with interstate transportation and the published charges therefor, and with devices to evade its provisions.
2. For the deliveries of coal by the Chesapeake and Ohio Railway Company, under the contract herein assailed, the amounts received by that company were always in excess of its published tariffs.
3. The transaction herein considered was one conducted throughout in good faith and without device of any kind.
4. Any loss, under the contract, to the Chesapeake and Ohio Railway Company was a loss on the sale of coal and not on the published tariffs.
5. A case cannot be made without allegations that make it.
6. There is no allegation in this case, not even casual specification, of the discrimination or preference conceived by the lower court.

Brief for the New York, New Haven and Hartford Railroad Company.

JOHN W. DANIEL,
FRED HARPER,
Of Counsel.

J. P. BELL COMPANY, Printers, Lynchburg, Va.

Supreme Court of the United States,
OCTOBER TERM, 1905.

NO. 24.

NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, APPELLANT,

vs.

INTERSTATE COMMERCE COMMISSION, APPELLEE.

~~In error to~~ appeal from the United States Circuit Court for the Western District of Virginia.

INTRODUCTORY.

There is to be considered in this case a contract of sale and delivery of coal by one great corporation, the Chesapeake and Ohio Railway Company, to another, the New York, New Haven and Hartford Railroad Company.

The Chesapeake and Ohio Railway Company is a corporation of the state of Virginia. The New York, New Haven and Hartford Railroad Company is a corporation of another state. The contract of sale and delivery of the coal to the latter corporation was across state lines. This fact gave jurisdiction to the Interstate Commerce Commission.

Upon the case made by the Interstate Commerce Commission, the Circuit Court of the United States for the Western District of Virginia decided every point in favor of the New York, New Haven and Hartford Railroad Company, which is our client. The perusal of the Court's opinion in the case made will, as we confidently believe, satisfy this Court that it could not have decided differently, so clear and convincing is the reasoning of the judge who presided below.

After deciding all the points raised in the record against the complainant below, and in favor of our client, the Court itself raised a point upon which it cast our client in the suit.

We propose to consider the whole cause in this argument; and we beg leave to say, in advance of the orderly development of our views, that it seems to us that both the Chesapeake and Ohio Railway Company, which agreed to sell and deliver the coal, and the New York, New Haven and Hartford Railroad Company, which bought the coal, employed sagacious and energetic methods in that business at a period when acute crisis and panic in commercial matters had just passed and depression still lingered. They subserved the public interest when to subserve it was also to subserve their own.

The contract of the Chesapeake and Ohio Railway Company, by enabling it, the seller, to keep up business on its line, also enabled the buying railroad, our client, to supply itself with the primary necessity of its business—coal. Coal operation, transportation, and the business dependent upon them were alike promoted at a time when lockouts, strikes and disorders had but recently caused a shudder throughout the body politic. The transaction therefore tended to the side of renewed prosperity and peace.

While this was the obvious tendency of the contract between the two companies we do not contend that beneficial results could, of themselves, validate the transaction if it were in violation of the Interstate Commerce Act in the manner charged. Had our client been party to such a violation of the law it could not be defended.

But it is to be observed that the Court below decided that it was not a party to such violation of law and it is for the innocent of record that we have the honor to appear.

Upon an unsuggested theory, vague, remote, not within the charges of the complainant's petition, and, as we respectfully submit, untenable in reason and unsupported by precedent, the court below astonished all parties by its ruling.

We are satisfied that when this theory, foreign to the record, is discussed, this Court will find full ground to sustain both the New York, New Haven and Hartford Railroad Company and the Chesapeake and Ohio Railway Company. We are also satisfied that it will discover that the court below not only erred in inventing the theory upon which it acted, but, in a logical sense, overruled and departed from the views it had already lucidly set forth in holding both companies acquit of the charges that appear in the record.

There must be *allegatum* before there can be *probatum*. The *probatum* would be *aliunde* if not responsive to the *allegatum*. In point of fact, no *probatum* could have been attempted as to the point raised by the Court as there was no *allegatum* in the petition to call for it. And further, in point of fact, there was no *probatum* to sustain the holding of the Court even if there had been *allegatum* upon which it could have been based.

This view will be set forth in a separate part of this argument after we have discussed the questions that were properly before the Court.

PART I.

STATEMENT OF THE CASE.

1. THE FACTS.

The important facts in the case are as follows:

On December 3d, 1896, a contract was entered into by the Chesapeake and Ohio Railway Company and the New York, New Haven and Hartford Railroad Company, whereby the former undertook to

> "furnish to said Railroad Company not to exceed two million gross tons of bituminous coal from its line in such quantities monthly as wanted from July 1, 1897, to July 1, 1902, without charge for demurrage. Deliveries to be made not exceeding four hundred thousand tons per annum."

The Chesapeake and Ohio Railway Company further agreed in the said contract to

> "deliver all bituminous coal to said Railroad Company in its bins at such ports upon its line as required by the monthly requisitions of its purchasing agent."

In consideration whereof the New York, New Haven and Hartford Railroad Company agreed to pay for said coal

> "at the rate of two and seventy five one hundredths dollars per gross ton New Haven basis, settlement to be made monthly."

It was the usual character of contract for coal by the New York, New Haven and Hartford Railroad Company and was drafted on one of its printed blanks used in such cases.

(See *fac simile*, Record p. 190.)

Under this contract the Chesapeake and Ohio Railway Company began the shipment of coal to the New York, New Haven and Hartford Railroad Company, as demand therefor was made, and delivered the same to such ports as directed.

During the winter of 1900-1901 the Chesapeake and Ohio Railway Company, by reason of strikes and other disturbing causes, failed to make delivery of the full quantity of coal due under the contract for that year. By reason of such failure the New York, New Haven and Hartford Railroad Company was compelled to purchase coal from other sources to supply its needs. For such coal it was compelled to pay a higher price than it was paying under the contract with the Chesapeake and Ohio Railway Company. The amount of this excess for the year 1900-1901 was $160,000.00. A claim for this amount was presented to the Chesapeake and Ohio Railway Company and payment demanded. The claim was finally adjusted by the payment of $120,000.00. Record (p. 117.)

In 1902 a general strike of coal miners paralyzed the coal industry and so hampered the Chesapeake and Ohio Railway Company in its endeavors to secure coal to complete its shipments due under its contract, that, at the end of the period covered by the said contract (July 1, 1902), there remained undelivered—but called for—approximately 60,000 tons of coal.

On account of such shortage it was again necessary for the New York, New Haven and Hartford Railroad Company to purchase coal from other sources to supply its needs, for which coal it was compelled to pay a higher price than it was paying the Chesapeake and Ohio Railway Company under the contract. The amount of the excess this time was $103,910.69. (Record p. 118.)

Again a claim for this amount was presented to the Chesapeake and Ohio Railway Company and payment demanded. Liability was not denied by said Company, but, on account of the hardship of the case, the failure to comply with the terms of the contract being due to extraneous and uncontrollable causes, it was again adjusted. On this occasion the Chesapeake and Ohio Railway Company offered to complete its deliveries under its contract—asking an extension of time to do so, and the privilege of delivering Kanawha coal instead of New River coal. This offer was accepted by the New York, New Haven and Hartford Railroad Company; and in April, 1903, Presidents of the two companies entered into an oral agreement embodynig those terms. (Record p. 119.)

The performance of this agreement was immediately begun and it was partially executed when the temporary injunction awarded by the Court below in this case prevented further compliance.

2. LEGAL PROCEEDINGS; AND THE AFFIDAVIT BEFORE THE INTERSTATE COMMERCE COMMISSION.

On the 30th day of June, 1903, W. C. Bullitt, a coal merchant of Philadelphia, filed an affidavit with the Interstate Commerce Commission setting forth the main facts as above related and charging the Chesapeake and Ohio Railway Company with departing from its published rates on file and with committing a discrimination "against all the other coal produced in the Kanawha District."

It was the FREIGHT RATE ON COAL

"from the said Kanawha District of West Virginia to Newport News"

that he complained of. He alleged that it prevented him from purchasing coal in the Kanawha District of West Virginia. THIS WAS THE GRAVAMEN OF HIS COMPLAINT.

On July 3rd, 1903, the Interstate Commerce Commission, acting upon the affidavit of Bullitt, requested Mr. G. W. Stevens, President of the Chesapeake and Ohio Railway Company, to appear and testify with reference to the facts therein set forth. Mr. Stevens did appear and gave a lengthy deposition relating to the whole transaction. (See Record pp. 12-40.)

3. PETITION OF THE INTERSTATE COMMERCE COMMISSION.

On July 13th, 1903, the Interstate Commerce Commission filed a petition in the Circuit Court for the Western District of Virginia asking certain injunctive and other orders against the Chesapeake and Ohio Railway Company and the New York, New Haven and Hartford Railroad Company. To this petition was attached, as a part thereof, the record of the hearing before the Interstate Commerce Commission at which Mr. Stevens had testified, and to which hearing the Chesapeake and Ohio Railway Company was the sole respondent.

The petition of the Interstate Commerce Commission in the Circuit Court recited the main facts of the case as set forth above and, referring to the performance of the terms of the oral agreement of April 1903, alleged and charged that:

> "the said Chesapeake and Ohio Railway Company is engaged in carrying freight traffic between the Kanawha District in the State of West Virginia and Newport News in the State of Virginia
>
> 1. *at less than its published rates on file*, and
>
> 2. is committing a discrimination forbidden by law, and that said act or acts hereinafter more specifically set forth are being committed in part in the Western Judicial District of the State of Virginia, and that such freight traffic is being carried for the New York, New Haven and Hartford Railroad Company as hereinafter more specifically set forth." (Record pp. 1-2.)

As to the New York, New Haven and Hartford Railroad Company it alleged:

"Your petitioner believes that the New York, New Haven and Hartford Railroad Company received the rebate or concession upon the traffic carried for it as aforesaid knowingly, and that said railroad company is acting equally in violation of law with the Chesapeake and Ohio Railway Company." (See Record p. 4.)

The Chesapeake and Ohio Railway Company and the New York, New Haven and Hartford Railroad Company were made parties defendant, a temporary injunction was awarded prohibiting further acts under the said contract of 1903, and the motion for permanent injunction was set down for argument.

4. THE DECREE OF THE CIRCUIT COURT.

After several continuances, the motion was argued and on February 19th, 1904, the Court filed its opinion and entered its decree. The decree, in substance, declared:

1. That the claim of the New York, New Haven and Hartford Railroad Company against the Chesapeake and Ohio Railway Company for $103,910.69, asserted as damages for partial nonperformance of the contract of December 3rd, 1895, is, as to the said claim and as to interest thereon, an illegal and unenforceable claim.

2. That the verbal agreement of April 1903, as set forth above, is an invalid and illegal agreement.

And the Court permanently enjoined the defendants from executing or performing or attempting in any way to execute or perform either of the said contracts; and further enjoined them from discharging or satisfying or attempting to enforce the payment of any claim arising thereunder. (Record pp. 228-229.)

A subsequent motion of the Interstate Commerce Commission to enlarge the terms of the injunction was overruled by the Court and the decree appealed from is as briefly set forth above.

5 ASSIGNMENT OF ERROR.

On March 18th, 1904, the New York, New Haven and Hartford Railroad Company, having served notice of joinder or severance on the Chesapeake and Ohio Railway Company, filed a petition of appeal which was allowed the same day. With its

petition the New York, New Haven and Hartford Railroad Company filed an assignment of errors briefly stated as follows:

1. That the Court erred in holding the claim for $103,910.69, arising from partial nonperformance of the contract of December 3rd, 1896, to be an illegal and unenforceable claim.

2. That the Court erred in holding the verbal agreement of April 1903 to be invalid and illegal.

3. That the Court erred in perpetually enjoining the Chesapeake and Ohio Railway Company from executing or performing either of said contracts.

4. That the Court erred in perpetually enjoining the New York, New Haven and Hartford Railroad Company from demanding or seeking the enforcement of the payment of the claim growing out of the partial nonperformance of the said contract of December 3rd, 1896.

5. That the Court erred in not dismissing the complainant's petition in said cause.

6. That the Court erred in holding the facts proved to constitute a violation of the third section of the Interstate Commerce Law.

7. That the interpretation put upon the language of the third section of the Interstate Commerce Law by the said Court is erroneous and unjust to said appellant, and the complainant did not allege that the appellant had violated the said section or any provision thereof.

8. That the Court erred in holding that the complaint alleged a violation of the said third section of the Interstate Commerce Law, and in finding that there was evidence to sustain that charge.

9. The decree is in other respects erroneous and unjust to appellant.

PART II.

ARGUMENT OF THE CASE OF RECORD.

The petition of the Interstate Commerce Commission in the Court below charges the defendant companies with violating the Interstate Commerce Act by carrying out the terms of the verbal agreement of April 1903, which is alleged to involve a carriage of

coal for less than the published rates on file and a discrimination forbidden by law.

1. THE CONTRACT OF 1903.

The defendant companies justify the terms of the contract of 1903 on two grounds:

(1) *That the contract of 1903 does not involve a violation of the Interstate Commerce Act.*

(2) *That if a seeming violation of the said Act does occur, it is a seeming violation only; for in fact the contract is based upon a legal, adjusted and enforceable claim for damages asserted by the New York, New Haven and Hartford Railroad Company against the Chesapeake and Ohio Railway Company; and in fact the freight rate is fully paid by the claim in part and by the purchase price received for the coal added thereto.*

If it be held that any loss to the Chesapeake and Ohio Railway Company growing out of the said contract of 1903 is a loss on transportation charges, and is, therefore, in effect, a less rate than the published rate on file, nevertheless this is a mere misleading statement and presents a half fact rather than a whole one. The released claim is a credit entering into the account and paid on the freight rate; and the mind should not be deluded or a false conclusion reached from a mere method of statement which does not count the weight which is really in the scales and which represents an actual and valid sum of money due to the recipient and received and accounted for in consideration of the freight carried. This is the realism and good faith of the transaction which, if unimpugned as such, must be accorded the consideration of actuality and not perverted by delusive sentences into another and different thing.

a. THE OPINION OF THE COURT AS TO THE CONTRACT OF 1903.

The Court below said in its opinion:

> "Inasmuch as no action by the court is asked because of the transactions prior to 1903, the legality of the contract of 1896 is of interest now, because on its legality depends the validity of the demand made in April 1903, by the New

York, New Haven and Hartford Railroad Company that the Chesapeake and Ohio Railway Company pay the bill of damages of about $103,000. In the answers of both defendants the justice of this demand is asserted. This bill is alleged to be (and I find no evidence to the contrary) the actual difference between the cost of the coal purchased by the New Haven Company from others and what would have been the cost to it had the Chesapeake and Ohio fulfilled the contract of 1896. The demand, therefore, cannot properly be considered an unadjusted or vague and unliquidated claim. The inference to be drawn from *Goodridge* v. *Union Pacific*, 37 Fed. 182, and *Union Pacific* v. *Goodridge*, 149 U. S. 690, is that an adjusted claim, if otherwise valid and enforceable, may be paid by a carrier by hauling for such creditor at a reduced rate, the difference between the schedule rate and the agreed rate being applied as a credit on the claim. While these opinions are obiter as to the question which we are now considering, as it did not arise in the above mentioned case, still it seems to me that this conclusion is sound. Where a carrier owes a legal, enforceable, and ascertained sum of money, I cannot perceive that the commerce act is violated if the debt be paid by carriage done by the carrier for its creditor at the carrier's legal freight rate." (Record pp. 216–217.)

Thus the contract of 1896 is the real transaction to which this cause must have reference and under which it must stand or fall. If that contract be valid and legal, the claim for damages was just, legal and valid, and enforceable; and the contract of 1903 is likewise legal and valid. If the contract of 1896 be illegal and void, then no breach thereof could furnish a basis for any new contract and the new contract must stand alone.

2. THE CONTRACT OF 1896.

It is perfectly apparent from an inspection of the record of this case that the contract of December 3rd, 1896, was purely and simply a *sale of coal* by the Chesapeake and Ohio Railway Company to the New York, New Haven and Hartford Railroad Company for a sum certain per ton delivered in its bins along its lines. The contract is susceptible to no other construction.

And the Chesapeake and Ohio Railway Company was likewise the shipper of the coal sold. It is true that various coal operators furnished the coal under contract with the Chesapeake and Ohio Railway Company, and various companies and individuals superintended the shipments thereof. But they were in each instance acting for the Chesapeake and Ohio Railway Company and it was always the latter that was the shipper of the coal over its own line and over the water route.

a. OPINION OF THE COURT AS TO THE CONTRACT OF 1896.

The Court below disposed of these two questions in its opinion as follows:

> " . . . it seems to me that in truth the C. & O., ... was the first party to the Beury contract, and that as to the transactions prior to April 1903, we must treat it as a carrier which purchased coal at mines on its road and delivered it to a purchaser after hauling the coal over its own line and having it carried and discharged by vessels employed by it." (Record p. 216.)

3. THE QUESTION OF ULTRA VIRES NOT INVOLVED.

It being true that the Chesapeake and Ohio Railway Company was the seller of the coal to be furnished under the contract of 1896, the complainant below (The Interstate Commerce Commission) cannot be heard to question the said contract as a sale of coal merely, because it has no interest in the mere vending of the coal that would give them a status in any court. And whether or not the Chesapeake and Ohio Railway Company had the legal right to buy and sell coal is a question with which the Court below—and this Court as well—has nothing to do so far as this case is concerned.

The *ultra vires* acts of a corporation can only be attacked by the sovereignty granting the charter or by some stockholder or other person interested in the corporation. They cannot be assailed by third parties.

Green's Brice's *Ultra Vires*, (2 ed.) 695;
4 Thomp. Corp. (5638);
5 Thomp. Corp. (6030–6032–6033–6034.)

a. THE COURT'S OPINION THAT ULTRA VIRES IS NOT INVOLVED.

In this connection the Court below very properly held:

a. That no third party can be heard to raise the question of *ultra vires* unless in some case where such party is directly injured by the *ultra vires* acts. (Record p. 117.)

b. That the Chesapeake and Ohio Railway Company has not raised that question; that the State of Virginia has not raised it; that no creditor has raised it; and farther, that "no federal law has been contravened by this contract in so far as it is merely *ultra vires*; and I do not perceive the right of the Interstate Commerce Commission to raise the question here." (Record p. 218.)

c. If this question could not be raised in this Court by the Chesapeake and Ohio when sued on the contract, surely no other party can raise it collaterally. (Record p. 219.)

d. "We are not at liberty to consider the question of *ultra vires* nor are we free to consider the contract of 1896 as illegal on account of the West Virginia statute." (Record p. 219.)

4. THE WEST VIRGINIA STATUTE NOT INVOLVED.

And likewise the West Virginia statute, prohibiting railroad companies from buying and selling coal and coke, has no application to this contract. The reasoning of the court below in disposing of this question is unassailable. The Court said:

"The contract does not stipulate that the C. & O. shall go into West Virginia and there buy coal. I say this, because, while the contract was to furnish coal from the line of the C. & O., there is no evidence that there is no bituminous coal field on the line of the C. & O. in Virginia. The burden of proof here is on the complainant (Benjamin on Sales (6th ed.), page 509). This court cannot take judicial notice of the fact (if it be such) that the only coal fields on the line of the C. & O. are in West Virginia. Moreover, this contract could have been complied with to the letter if the C. & O. had purchased of dealers in Virginia coal that had been mined on its line in West Virginia, and which had been brought into Virginia while the property of the dealers. And, surely, a contract by a Virginia corporation, not made in West Virginia, and not to be performed in that state, cannot be held by this Court to be in contravention of

the West Virginia statute. . . . Where a contract does not require a vendor to do an act prohibited by law in order to obtain the property he is selling, and where the vendee does not know that intent of the vendor, and especially where the contract could be performed without a violation of the law, it seems to me that this Court would not be warranted were the vendee suing the vendor for a breach of the contract to allow the latter to raise the question of illegality. To allow the delinquent to escape the obligation of his contract savors too strongly of allowing a wrongdoer to take advantage of his own wrong. If this question could not be raised in this court by the C. & O. itself, when sued on the contract, surely no third party can raise it collaterally." (Record pp. 218–219.)

5. THE INTERSTATE COMMERCE ACT.

If the contract in question be held to be illegal and void on any ground at all, it must be so held because of the terms of the federal statutes regulating interstate commerce. The only sections, as we contend, of the Interstate Commerce Act alleged by the petition in the Court below to have been violated, are sections 2 and 6.

a. THE SECOND SECTION NOT VIOLATED.

The second section of the Interstate Act is as follows:

"That if any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, rebate, drawback or other device, charge, demand, collect or receive from any person or persons a greater or less *compensation* for any service rendered or to be rendered, in the *transportation* of passengers or property subject to the provisions of this act, than it charges, demands, collects or receives from any other person or persons for doing for him or them a like and cotemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be declared guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful."

(1) THE GOOD FAITH OF THE CONTRACT OF 1896.

It is admitted that if the contract of December 3rd, 1896, were made *for the purpose and with the intention* of giving to the

New York, New Haven and Hartford Railroad Company a "special rate, rebate, or drawback" with reference to the transportation of the coal to be delivered thereunder, then the contract would have been a "device"; and it would have been in violation of section 2, now under consideration.

But there can be no question that the said contract was one for the sale and transportation of coal made in the utmost good faith and without any intent or purpose to give such "special rate, rebate or drawback."

Mr. John M. Hall, then President of the New York, New Haven and Hartford Railroad Company, stated in his affidavit:

> "Neither this defendant nor its officers had any knowledge of the price that the Chesapeake and Ohio Railway Company expected to pay for the coal at the mines, nor of the tariff rates, at that time existing, from the mines to Newport News, nor the water freight from Newport News to New Haven, Connecticut; Providence, Rhode Island; or Boston, Massachusetts. . . . This defendant *does not receive and has not received at any time any rebate or advantage of any kind in transportation of coal over the lines of the Chesapeake and Ohio Railway Company.* . . . It has not now and never has had during its dealings with the Chesapeake and Ohio Railway Company any purpose or desire to transgress, evade or in any way nullify the provisions of the Interstate Commerce Law as to uniform rates of transportation." (Record pp. 117–120.)

And Mr. M. E. Ingalls, former President of the Chesapeake and Ohio Railway Company, states in his affidavit:

> "And this deponent further says that in this whole matter he, the said M. E. Ingalls, acted according to his judgment in the best interests of all concerned, that he, the said M. E. Ingalls, regards the contract with the Chesapeake and Ohio Railway made through him with the New York, New Haven and Hartford Railroad Company as having saved the Chesapeake and Ohio Railway Company a place in the market, having kept the mines along its lines going and the mine laborers therein at work, and kept the said cola in the market; that the said arrangement was of the greatest benefit not only to the Chesapeake and Ohio Railway

Company but to the community served by it known as the New River District." (Record p. 115.)

In other words the Chesapeake and Ohio Railway Company entered the field as a dealer and made the contract of December 3rd, 1896, in order to save itself as a carrier.

(2) THE COURT'S OPINION UPHOLDING THE CONTRACT OF 1896. NO RUSE OR DEVICE.

The Court below in its opinion, said:

"I can find no evidence in the record which satisfies me that in making the contract of 1896, the C. & O. intended a ruse or device to give a rebate on freight rates to the New Haven Company." (Record p. 222.)

"I do not find here that the contract of 1896 was intended as a ruse or device to evade the Commerce Act. It appears to have been an entirely honest effort by Mr. Ingalls to find a market for coal produced on his line." (Record p. 220.)

"But in the case at bar I am unable to find evidence of an intent to carry at less than the published rates of the C. & O." (Record p. 221.)

If, therefore, the contract of December 3rd, 1896, be held to be illegal under the said section 2 (or any other provision of law), it must be so held because of its *necessary* legal effect apart from the intent with which the said contract was made.

Section 2 of the Interstate Commerce Act prohibits any "special rate, rebate, or drawback" whether given "*directly or indirectly.*" There is absolutely no evidence in the record of such direct special rate, rebate or drawback. The absence of the intent to violate the law, as found by the Court below, would dispose of that feature of the case. The only remaining question, therefore, under this section is: Was there any "special rate, rebate or drawback" on the *transportation* of the coal in question over the line of the Chesapeake and Ohio Railway Company given *indirectly?*

The reasoning of the Court below, in its opinion on this point, seems to us to be unanswerable. The Chesapeake and Ohio Railway Company was the vendor of the coal. It was also the

carrier thereof. It charged the New York, New Haven and Hartford Railroad Company a fixed sum per ton for both the coal and its transportation. It had a perfect legal right to charge any losses that may have occurred to its account as vendor rather than to its account as carrier. Indeed, the provisions of the law required that its full freight rate shall be charged and collected and the Company *could not legally* charge any losses to its account as carrier, just as it could not charge any profits from the contract to its freight rate account. So long as there was a sufficient sum paid to it under the contract to pay its transportation charges (and this was always the case in the matter now under investigation) then the law makes the application to those charges.

As the Court below said:

> "If the carrier under such circumstances does not on its books credit its freight account with its published rates, and does not charge the loss to an account kept with the article dealt in, or to income, there would be a seeming violation of the 2nd and 6th sections of the Act. But this would be at the utmost a technical violation (if it has a right to suffer loss as a dealer), and it seems to me that it could with difficulty be considered a violation in any sense. The law is not concerned with the carrier's methods of book-keeping. When the dealing is not a device to evade the law, and if the carrier can legally suffer a loss as a dealer, it seems to me matter of no moment that it go through the form of crediting its full freight earning on the transportation account, and charging the loss on the transaction to an account kept with the article dealt in, or to some other account." (Record pp. 220–221.)

And so long as a sufficient sum is realized from the sale of the coal by the vendor-carrier to cover its transportation charges, bearing in mind that the contract of sale is not a mere device to evade the law, there can be no unjust discrimination in the freight rates. As was said by Cooley, Chairman, in *Haddock* v. *Delaware, Lackawanna and Western Railroad Company*, 4 I. C. C. Rep. 296:

> " . . . . There is, from the very nature of the case and because of the situation—the respondent being both carrier and shipper—a situation that we must assume we can in no wise change or alter, an absolute impossibility of applying any definite rule whereby unjust discrimination can be determined."

And in *Coxe* v. *Lehigh Valley Railroad Company*, 4 I. C. C. Rep. 535, another similar case in which the Railroad Company was alleged to have violated the law by discriminations in favor of a coal company, all of the stock of which was owned by the Railroad Company, Morrison, Commissioner, said:

> "And while the coal company in the exercise of its chartered rights may acquire and hold mineral and other lands, at its own pleasure, mine and buy coal without restraint as to cost, and sell it at whatever price it may be willing to accept and is able to obtain, it is impracticable to regulate or cause the discontinuance of the conditions and methods of business, which result in the undue preference and discrimination complained of in this branch of the case."

And so here, the Chesapeake and Ohio Railway Company, so far as the parties to this case are concerned, having a perfect legal right to buy and sell and ship coal, to purchase at such price as it might be willing to pay, and to sell at such price as it might be willing to accept and able to obtain, it is impracticable to cause the discontinuance of such buying and selling. As the Court below said:

> "Being unable, therefore, to find in the law anything which forbids a carrier to be a dealer in articles to be carried by it, and also being unable to find anything which forbids it as a dealer to suffer honest losses, I am unable to say that the transactions in question were in violation of the 2nd section of the Act." (Record p. 223.)

As was intimated in *Coxe* v. *Lehigh Valley Railroad Company*, above cited, the fact that a vendor-carrier was willing to sell coal and transport it for such sum as was insufficient to pay all expenses, cost of coal, and transportation charges, would be evidence that its rates were too high and that it was willing to carry such freight at a cheaper rate. So here, if the facts proved show that the

Chesapeake and Ohio Railway Company is willing to contract for the sale and transportation of coal at a less sum than will pay all costs, expenses and its full published freight rates, it is evidence that such rates are too high and that the Chesapeake and Ohio Railway Company is willing to transport such coal at a cheaper rate.

But there is no allegation in the petition that the rates are excessive or unreasonable. There is no prayer that the Court will so hold. And so long as there is a sufficient sum realized from a sale honestly made by a vendor-carrier to pay its full transportation charges, there can be no discrimination with respect to those charges, and there is no violation of section 2 of the Act.

b. SECTION 6 OF THE INTERSTATE COMMERCE ACT NOT VIOLATED.

The same reasoning will apply to section 6 of the Act. This section, so far as its terms are in question in this case, is as follows:

> "And when any such common carrier shall have established and published its rates, fares, and charges in compliance with the provisions of this section, it shall be unlawful for such common carrier to charge, demand, collect or receive from any person or persons a greater or less compensation for the transportation of passengers or property, or for any service in connection therewith, than is specified in such published schedule of rates, fares, and charges as may at the time be in force."

If the conclusion reached with reference to section 2 of the Act is correct, then no discussion of section 6 is necessary. If the Chesapeake and Ohio Railway Company has a right to charge its losses under the contract of 1896 to its account as dealer, paying itself its full freight rates for the transportation of the coal in question, then it did not charge the New York, New Haven and Hartford Railroad Company less than its published rates on file, as alleged, and there was no violation of section 6 of the Act.

6. THE COURT'S DISPOSITION OF THE CASE MADE.

Two charges are made in the complaint of the Interstate Commerce Commission against the Chesapeake and Ohio Railway

Company and the New York, New Haven and Hartford Railroad Company:

1. That the Chesapeake and Ohio Railway Company "is engaged in carrying freight traffic between the Kanawha District in the State of West Virginia and Newport News in the State of Virginia at less than its published rates on file, and is committing a discrimination forbidden by law." (Record p. 1.)

A variation of this charge appears on page 4 of the Record where it is alleged that the Chesapeake and Ohio Railway Company:

"Is engaged in the carriage of freight traffic between the points set forth above at less than its published rates on file, and is committing a discrimination against all other coal produced in the Kanawha District of West Virginia, which said discrimination is forbidden by law."

2. That the New York, New Haven and Hartford Railroad Company "received the rebate or concession upon the traffic carried for it as aforesaid, knowingly, and said railroad company is acting equally in violation of law with the Chesapeake and Ohio Railway Company."

It will be observed

1. That the Chesapeake and Ohio Railway Company was the carrier of the freight:

2. That the New York, New Haven and Hartford Railroad Company was neither the shipper of the freight, the carrier of the freight, nor, save in one respect, alleged to have violated law. That is to say, in respect to the allegation that it received the rebate or concession upon the traffic carried for it as aforesaid, knowingly.

When it was held by the Circuit Court on the trial that the Chesapeake and Ohio Railway Company *had not carried freight at less than its published rates on file* and *had not committed the alleged discrimination forbidden by law*, the case ended as to the New York, New Haven and Hartford Railroad Company, which could not, of course, have received the concession that had not been made.

The Court in its opinion expressly declared:

1. Its inability to find evidence of an intent to carry at less than the published rates of the C. & O. (Record pp. 221-222.)

2. That the contract was not intended as a ruse or device to evade the Commerce Act. (Record p. 220.)

3. That it appears to have been "an entirely honest effort by Mr. Ingalls to find a market for coal produced on his line." (Record p. 220.)

4. That there is no evidence in the record "which satisfies me that in making the contract of 1896, the C. and O. intended a ruse or device to give a rebate on freight rates to the New Haven Company." (Record p. 222.)

5. That being unable to find in the law anything which forbids a carrier to be a dealer in articles to be carried by it, and also being unable to find anything that forbids it as a dealer to suffer honest losses, "I am unable to say that the transactions in question were in violation of the 2nd section of the Act." (Record p. 223.)

6. That "No discussion of the 6th section of the act is necessary. If the transactions prior to 1903 did not violate the 2nd section, they did not violate the 6th section." (Record p. 223.)

It will thus be seen that in the most emphatic way and with the clearest specification the Court completely exonerated this respondent below from the charge which it was summoned to answer; and we proceed to discuss what was nevertheless the holding of the Court, with its own manifest opinion that there was no proof in the record that upheld the charge and that this respondent was acquit thereof.

PART III.

THE INVENTED CASE AND THE COURT'S DECISION THEREOF.

We come now to the consideration of the case which was invented by the Court, a case not presented, as we conceive it, by the pleadings and one that should not have been considered at all.

And even if it had been properly before the Court upon the pleadings, the decision thereof was, as we shall attempt to demonstrate, erroneous and not justified by a proper interpretation of the language of the section which the Court itself invoked.

In respect to the question which the Court does decide against our client it should also be borne in mind, before we state it, that the Court below declares:

> 1st. "If the commerce act was not violated by the transactions prior to April 1903, then on that date the C. & O. was, so far as this Court can say, legally obligated to pay to the New Haven Company the $103,000 claimed as damages for failure to make deliveries." (Record p. 219.)
>
> 2d. That in reaching this conclusion of fact the Court regards the C. & O. as both the vendor and the carrier of coal; and holds this action in both characters to be unquestionable in this case, excepting only as to whether such dealings are mere devices to cover an intentional giving of less rates of carriage to some than to others. (Record p. 220.)
>
> 3d. "The law is not concerned with the carrier's method of book-keeping. Where the dealing is not a device to evade the law, and if a carrier can legally suffer loss as a dealer, it seems to me a matter of no moment that it go through the form of crediting its full freight earnings on the transportation account, and charging the loss on the transaction to an account kept with the article dealt in, or to some other account." (Record pp. 220–1.)

An additional fact not to be overlooked is the declaration of the Court that the "price received for the coal was in excess of all cost items including the C. & O. freight charge for January and February, and from April to and including October, 1899." The net result for that period showed a profit. But it also holds that "Since October 1899, there has always been a loss" to the Chesapeake and Ohio (in the aggregated account of sale price and freight received by the Chesapeake and Ohio) and that "stopping the account at January 1, 1903, the loss largely exceeded the gain."

The transaction then which we have to deal with, as stated by the Court, is a legal transaction conducted in good faith, which

at periods produced a net profit and at other times produced a loss to the Chesapeake and Ohio. The Court estimates this loss to the Chesapeake and Ohio as averaging over 23 cents per ton on the actual deliveries.

When we proceed to the merits of the juridically invented charge we find that it is itself extenuated and applied without any sort of specification of any person affected by it, or to any PARTICULAR TRAFFIC transaction affected by it. It seems plain also that, with absolute good faith proclaimed in the transaction which took place, and with absolute validity thereof declared by the Court as a question of law, any deduction of undue or unreasonable preference or advantage to anybody, or undue or unreasonable prejudice or disadvantage to anybody, would of necessity be a *non sequitur*.

1. SECTION 3 OF THE INTERSTATE COMMERCE ACT.

Having disposed of the case as it had been made, the Court turned its eyes to the 3d section of the Interstate Commerce Law, which is as follows:

> "That it shall be unlawful for any common carrier subject to the provisions of this act
>
> (1) to make or give any undue or unreasonable preference or advantage
>
> (2) to any particular person, company, firm, corporation, or locality, or
>
> (3) any particular description of traffic,
>
> in any respect whatsoever, or to subject
>
> (1) any particular person, company, firm, corporation, or locality, or
>
> (2) any particular description of traffic,
>
> (3) to any undue or unreasonable prejudice or disadvantage
>
> in any respect whatsoever."

(The method of quotation and inserted figures are our own.)

And it was under this provision of the Interstate Commerce Act that it gave opinion and decree that the transaction between the Chesapeake and Ohio Railway Company and the New York, New Haven and Hartford Railroad Company was null and void.

a. VIOLATION OF SECTION 3 NOT ALLEGED.

It is assigned as error by the Appellant, the New York, New Haven and Hartford Railroad Company,

> "That the said Court erred in holding and deciding that the complaint duly alleged and charged that an offense had been committed by the appellant against the provisions of the third section of the Interstate Commerce Act."

It is to be observed that neither the relator, W. C. Bullitt, upon whose affidavit the machinery of the Interstate Commerce Commission was set in motion, nor the Interstate Commerce Commission itself, in its complaint, had ever intimated that the Chesapeake and Ohio Railway Company had made or given any "undue or unreasonable preference or advantage" either to this respondent or to anybody else.

It is to be observed also that neither the relator nor the Commission had imputed to the Chesapeake and Ohio the subjection of "any particular person, company, firm, corporation or locality, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

And it is to be still farther observed that this respondent was not alleged to have any complicity in or knowledge of any such preference, advantage, prejudice or disadvantage.

Nevertheless the Court considered this section, which had not been brought into consideration by the case made, and extenuated the meaning of the charges in the complaint of the Interstate Commerce Commission to such degree as to embrace a matter not in contemplation of any party and not, as we conceive, within the sense of the law under which the charges were made.

In a supplemental opinion the Court said:

> "It will be found that the petition charges that the C. and O. 'is engaged in carrying freight . . . . at less than its published rates on file, and is committing a discrimination forbidden by law.' Again, 'Petitioner . . . . charges that the Chesapeake and Ohio Railway Company in this transaction is engaged in the carriage of freight . . . . at less than its published rates . . . . and is committing a discrimination against all other coal produced in the Kanawha District.'" (Record p. 230.)

Under this strained interpretation of the charges it held as follows:

> "Having found that some or all of the persons concerned with the Kanawha coal destined for points beyond the Capes other than that for the New Haven Company were subjected to an undue disadvantage, it follows that I have found that this particular traffic has been subjected to such disadvantage." (Record p. 230.)

We respectfully submit that the terms of the charge distinctly show that the complainant regarded the alleged carriage of freight at less than published rates on file as being the particular and only discrimination forbidden by law. No other discrimination was conceived by any party to the cause, nor could have been, as we contend, reasonably conceived from the reading of the complaint and the statute upon which it rested.

b. PROCEEDINGS UNDER THE ELKINS ACT.

It is true that the Elkins Act provides remedies and procedure in cases arising under the Act to Regulate Commerce, and its terms must be looked to in determining general questions of pleading in such cases.

See *Missouri Pacific R. R. Co.* v. *U. S.*, 189 U. S. 284.

And it is true that the 3d section of the Elkins Act provides that the Circuit Courts of the United States having jurisdiction, sitting in equity, shall proceed

> "summarily to inquire into the circumstances upon such notice and in such manner as the Court shall direct and without the formal pleadings applicable to ordinary suits in equity. . . ."

But we confidently contend that, however informal the pleadings may be in interstate commerce proceedings, and however untechnical a court is allowed to be under the 3d section of the Elkins Act, it is inconceivable that it was within the purview of that Act to wipe away the landmarks and bulwarks of jurisprudence and to permit a cause uncharged to be heard and adjudicated; or to engraft upon a charge that is made one that is wholly different and to which no one has been summoned to answer.

The '*allegata*' and the '*probata*' must conform in all manner of legal proceedings. '*Probata*' that are not '*allegata*' are irrelevant. Unless the two things come together there is no case. It is not for courts to make cases. Their sole function is to decide them when made by the parties before them.

The petition in the Court below was drawn with an eye single to the language of the Elkins Act concerning carriage at less than the published rates. The prayer of the petition is based on the supposed meaning and intent of that Act. Counsel representing the Interstate Commerce Commission below were specific and aggressive in their insistence upon this truth and urged upon the Court the language of the Elkins Act as completely covering this case.

There was no attempt in the petition to allege a violation of the 3d section of the Act to Regulate Commerce.

c. A DECISION OF THIS COURT IN POINT.

The third section of the Interstate Commerce Act prohibits "*undue or unreasonable preference or advantage*" and "*undue or unreasonable prejudice or disadvantage.*" Clearly the prohibited advantage or disadvantage in order to be unlawful must be "undue or unreasonable."

> "And as there is nothing in the Act which defines what shall be held to be due or undue, reasonable or unreasonable, such questions are questions, not of law, but of fact."
>
> *Texas and Pac. R. R. Co.* v. *Interstate C. C.*, 162 U. S. 219.

And the violation should be pleaded or alleged.

Yet nowhere in the petition does the words "undue" or "unreasonable" occur.

Nowhere in the petition is the allegation made that any "preference or advantage" is given.

Nowhere in the petition is it alleged that any person, place, or particular description of traffic is subjected to any "prejudice or disadvantage."

We submit that there is no allegation in the petition that would have put the defendants below on notice that they would

be called upon to answer a charge of violation of the 3d section of the Act to Regulate Commerce.

The allegations that are made in the petition and upon which the Court below rested its decision are that the defendants were violating the law by an agreement for the carriage of freight at less than the published rates of the Chesapeake and Ohio Railway Company and that a discrimination forbidden by law was being committed against all other coal produced in the Kanawha District.

These allegations follow the wording of the Elkins Act almost exactly. And it is respectfully urged that the only reasonable and just interpretation to be put upon these allegations is that they contain a charge of carriage at less than the published rates on file, and any discrimination alleged is confined to such as grows out of that carriage at less than the published rates on file. That was the interpretation placed upon the petition by counsel who drew it; that was the interpretation urged by them in the Court below. It was the only charge pretended to be made in the petition.

It related solely to transportation and the charges therefor, "from the Kanawha District to Newport News." It had nothing to do with the supposititious and imagined, but undiscoverable parties or persons in New England, to "some or all" of whom are ascribed disadvantages which are undefined and are also imaginated and supposititious.

In the case of *Texas and Pacific Railroad Co.* v. *Interstate Commerce Commission*, 162 U. S. 197, the Interstate Commerce Commission proceeded, under the Act to Regulate Commerce (which is almost in the identical language of the Elkins Act so far as procedure in Court is concerned) to enforce the observance of its order by the Texas and Pacific Railroad Company. The main question at issue was what circumstances and conditions had been, and what should have been, considered by the Commission in making its order.

The Circuit Court of Appeals sustained the Circuit Court on the ground that even if ocean competition did create a dissimilar

condition to competition wholly on land, yet the difference in rates that were proved in the case was too great to be justified by that condition. Mr. Justice Shiras, delivering the opinion of this Court which overruled that view, said:

> "This cause proceeded, we think, upon an erroneous view of the position of the case. *That question was not presented* to the consideration of the Court. *There was no allegation* in the Commission's bill or petition that the reduced rates charged by the defendant company were unreasonable. *That issue was not presented.*"

Thus it was held that, though the pleadings under the statute were permitted to be informal, yet no decision could be had on a case not presented.

So here, in order to justify the court in considering the question of undue or unreasonable prejudice or disadvantage, it should be alleged.

d. PROVISIONS OF SECTION 3 NOT VIOLATED.

The sixth assignment of error of the appellant is as follows:

> "That the said court erred in holding that the facts proven in said case constituted any violation of the third section of the Interstate Commerce Act."

The Court below in considering the third section of the Act to Regulate Commerce laid great stress on the words "in any respect whatsoever." And it reached the conclusion that any undue or unreasonable preference or advantage, or any undue or unreasonable prejudice or disadvantage, is within the inhibition of the said section, however it might arise, even though from the acts of a vendor in the sale of a commodity, if such vendor, perchance, be the carrier thereof.

We submit with confidence that the section is not properly susceptible to any such construction.

1. ANALYSIS OF THE ACT TO REGULATE COMMERCE.

The intent of the legislative body, as expressed in the words of the statute, must control the Courts in their construction of such statute. And in seeking this legislative intent:

> "Resort may be had to every part of a statute, or, when there is more than one *in pari materia*, to the whole system." *Kohlsaat* v. *Murphy*, 96 U. S. 153–159.

Let us analyze the Act to Regulate Commerce, therefore, and seek what light we can from the whole context.

Section 1 of the Act begins as follows:

"The provisions of this act shall apply to *any common carrier* or carriers *engaged in the transportation* of *passengers* or property. . . ."

And "Transportation shall include all instrumentalities of *shipment* or *carriage.*"

And it provides that:

"All charges made for any *service* rendered or to be rendered in the *transportation* of *passengers* or *property* or in *connection therewith*, or for the *receiving, delivering, storage* or *handling* of such property, shall be reasonable and just." "And every unjust and unreasonable charge for *such service* is prohibited."

Section 2 prohibits special rates, rebates or drawbacks and other devices whereby one person is charged a greater or less compensation than another person for any service rendered or to be rendered

"in the *transportation*, of passengers or property," under like conditions and circumstances.

Section 4 provides that it shall be unlawful to charge or receive greater compensation in the aggregate

"for the *transportation* of passengers or of like kind of property under substantially similar circumstances"

for a shorter than for a longer distance over the same line.

Again in the same section it is provided that under certain circumstances common carriers may so charge less for a longer than for a shorter distance

"for the *transportation* of passengers and property."

Section 6 provides:

1. That every common carrier shall publish its schedule of rates and fares and charges

"for the *transportation* of passengers and property."

Such schedules shall contain the "classification of freight" in force and "the terminal *charges.*"

2. It shall be unlawful to charge any person a greater or less compensation than is specified in such schedules

"for the *transportation* of passengers or property, or for any service in connection therewith."

3. Joint tariffs for through

"*transportation* of passengers or freight" over different lines shall be published and filed with the Commission.

4. It shall be unlawful for any common carrier, party to any joint freight tariff, to charge any person a greater or less compensation than is specified in such joint tariff

"for the *transportation* of persons or property or for any service in connection therewith."

5. If such rates as required to be filed be not filed in accordance with this section, an injunction may be issued against the carrier in default to restrain such carrier

"from receiving or *transporting* property among the several states &c."

Section 7 provides that it shall be unlawful for any common carrier to enter into any combination or contract to prevent a *continuous carriage* by

"change of time schedule, carriage in different cars, or by any other means or devices."

Section 10 provides that whenever,

"by means of false billing, false classification, false weighing, or false report of weight, or by other device or means"

any common carrier or officer or agent thereof shall permit or assist any person to obtain

"*transportation for property* at less than the regular rates then established"

it shall be deemed a misdemeanor.

If any person shall by payment of money or other thing of value, solicitation or otherwise, induce any common carrier, or any of its officers or agents to discriminate unjustly in his favor

"in the *transportation* of property"

he shall be guilty of a misdemeanor.

Section 22 provides that nothing in this Act shall prevent

"the *carriage, storage or handling* of property"

free or at reduced rates for the United States, &c.

Section 23 (Act March 2, 1889) provides that the U. S. Circuit and District Courts shall have jurisdiction upon complaint by any person that he is prevented by a common carrier, by reason of its violation of the Act to Regulate Commerce, from having interstate commerce moved by such carrier at the same rate as others are charged and under conditions as favorable as those given to others,

"to issue a writ or writs of mandamus against said common carrier, commanding such common carrier *to move* and *transport* the traffic, or to furnish *cars or other facilities* for *transportation* for the party applying for the writ."

Thus it will be seen that each of the sections above noted (the only ones of the Act to Regulate Commerce, except section 3, having any bearing on the policy and intent of the law) have reference only to

1. "*Transportation* of passengers or property;"
2. "Any *service* in *connection therewith*;"
3. "Receiving, delivering, storage, or handling of such property;"
4. "Terminal *charges*;"
5. "Time schedules, carriage in different cars;"
6. "False billing, false classification, false weighing or false report of weight;"
7. The furnishing of "cars or other facilities for *transportation*."

From this analysis it clearly appears that the sole intent and spirit of the Act is to provide for reasonable rates, equal charges, fair dealing and equal facilities in the "*transportation* of *passengers* and *property*." And it is in the light of this spirit and intent that section 3 must be read.

That section provides in its second clause:

"Every common carrier subject to the provisions of this Act shall, according to their respective powers, afford all reasonable, proper, and *equal facilities* for the interchange of traffic between their respective lines, and for the *receiving*,

> *forwarding*, and *delivering* of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their *rates* and *charges* between such connecting lines; but this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business."

Thus in the very section under consideration, in its second clause, the like spirit and intent is plainly manifest. That is, the intent to legislate with reference to the "transportation of passengers and property and *any service* in connection therewith," and with reference to nothing else.

It is well settled law that the general subject and purpose of the statute, read as a whole will restrict the meaning of general words in some portion of the statute in order to effectuate the true legislative intent.

As Chief Justice Marshall said in *Pennington* v. *Coxe*, 2 Cranch 33-52:

> "That a law is the best expositor of itself; that every part of an act is to be taken into view for the purpose of discovering the mind of the legislature; and that the details of one part may contain regulations restricting the extent of general expressions used in another part of the same act, are among those plain rules laid down by common sense for the exposition of statutes which have been uniformly acknowledged."

In that case a statute was under consideration in one section of which it was provided that "there be levied, collected, and paid, upon *all sugar which shall be refined within the United States* a duty of two cents per pound." But upon consideration of the whole act the general words were restricted in their scope so as to conform to the legislative intent; and the tax was held to apply only to such sugar as was refined in the United States *and removed from the factory.*

And as was said in *Kohlsaat* v. *Murphy*, 96 U. S. 153-159:

> "In the exposition of statutes, the established rule is that the intention of the law maker is to be deduced from a view of the whole statute, and every material part of the same;

> and when there are several statutes relating to the same subject, they are all to be taken together, and one part compared with another in the construction of any one of the material provisions, because, in the absence of contradictory or inconsistent provisions, they are supposed to have the same object as pertaining to the same system. Resort may be had to every part of the statute, or, where there is more than one *in pari materia*, to the whole system, for the purpose of collecting the legislative intention, which is the important inquiry in all cases where the provisions are ambiguous or inconsistent."

And this intent may be found to be limited in its scope to a narrower field than the use of certain general expressions would ordinarily imply if considered alone. In such cases the Courts do not hesitate to limit the scope of the general words and expressions so as to conform them to the real legislative intent as gathered from the whole act.

As was said in *Brewer* v. *Blougher*, 14 Pet. p. 198:

> "It is undoubtedly the duty of the Court to ascertain the meaning of the legislature, from the words used in the statute, and the subject matter to which it relates; and to restrain its operation within narrower limits than its words import, if the court are satisfied that the liberal meaning of its language would extend to cases which the legislature never designed to embrace in it."

See also

Washington Market Co. v. *Hoffman*, 101 U. S. 112, 116;
Petri v. *Commercial Bank*, 142 U. S. 644;
U. S. v. *Am. Bell Tel. Co.*, 159 U. S. 649;
U. S. v. *Trans-Missouri Frgt. Assn.*, 166 U. S. 290–320.

In accordance with the rules of construction as sanctioned in these cases, we contend that the words of general scope in the third section of the Act, should be so restricted in their meaning as to conform them to the general intent of Congress as disclosed by a consideration of the whole Act.

The clause of the 3d section now being considered is as follows:

> "That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or

> unreasonable preference or advantage to any particular person, company, firm, or corporation, or locality, or any particular description of traffic, in *any respect whatsoever*, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in *any respect whatsoever*."

That is *in any respect whatever with reference to the transportation* of *passengers* or *property*. And the transportation includes (only) all *instrumentalities of shipment or carriage*.

Common carriers engaged in interstate carriage are the only ones subject to the provisions of the Act and are so subject only when engaged in and about *such carriage*.

And we suggest that the Court might well adopt in this case the language of the Court in *McKee* v. *U. S.*, 164 U. S. 287-293, as follows:

> "But we think a perusal of the whole Act prevents our giving this unlimited construction, because to do so would conflict with what we think was the intention of Congress, gathered from the provisions of the whole act. Under such circumstances it is not only the right but it is the plain duty of the Court to limit by a proper construction the otherwise boundless application of the general language used in the statute."

And this contention is further strengthened by an examination of the Elkins Act. It must be conceded that the Elkins Act and the Act to Regulate Commerce are *in pari materia*, and belong to the same "system." It is therefore proper to be considered in seeking the true legislative intent underlying the system.

The Elkins Act, in its general provision summing up the unlawful acts of a common carrier, provides:

> "It shall be unlawful for any person, persons, or corporation to offer, grant, or give or to solicit, accept, or receive any rebate, concession, or discrimination in *respect of the transportation of any property* in interstate or foreign commerce by any common carrier subject to said Act to Regulate Commerce and the acts amendatory thereto *whereby*

any such property shall by any device whatever be *transported at a less rate* than that named in the tariffs published and filed by such carrier as is required by said Act to Regulate Commerce and the acts amendatory thereto, or *whereby* any other advantage is given or discrimination is practiced."

In other words the "less rate," "other advantage," or "discrimination" must arise from a "rebate, concession, or discrimination *in respect of the transportation of any property.*"

And the "*any respect whatsoever*" of the 3d section of the Act to regulate Commerce must be restricted likewise to the same scope so clearly defined by the whole Act and those *in pari materia.*

It seems clear, therefore, that in holding the defendants below guilty of a violation of the provisions of section 3 of the Interstate Commerce Act, by reason of acts legally disconnected from any question of rates of transportation, the Court below erred.

2. THE TRUE MEANING OF SECTION 3.

But, even if the Court below was correct in its view that the provisions of section 3 were properly involved in the case before it, yet we contend that it erred in the interpretation it gave to those provisions and in the application it made of them to the case under consideration.

Let us see now what is the meaning of the 3d section of the Interstate Commerce Act which has been juridically applied. What is the kind or preference or advantage that is denounced by this section? Only that which is "undue or unreasonable." We cannot impute undueness or unreasonableness to an honest transaction made without any intent to violate any law and conforming itself to every principle of legal and moral rectitude and being fully understood by intelligent parties, each pursuing his own business.

The reasonableness of the transaction to the Chesapeake and Ohio Railway Company was obliged to be governed by the honest consideration imputed to the President of that Company

by the Court. He was intelligently endeavoring "to find a market for coal produced on his line." (Record p. 220.)

Its undueness could only be imputed to some partiality which preferred one person or locality over another.

There is not the slightest imputation of this kind either in the allegation or in the proof. Neither is there the slightest ground for the claim that any PARTICULAR DESCRIPTION of traffic was preferred over any other PARTICULAR DESCRIPTION of traffic. There is no scintilla or suggestion that the traffic of one miner in the Kanawha District of West Virginia was given preference over that of another miner in the same section or any other section. The record is as blank as a newly whitewashed wall with respect to allegation or proof as to any actual or any suspected discrimination between any species of traffic that could or did compete.

What is meant by the terms of the 3d section which denounces preference or advantage *to any particular person, company, firm, corporation or locality?* A PARTICULAR person is not *any* person. Neither is a PARTICULAR company, firm, corporation or locality any unknown or imaginable company, firm, corporation or locality. It was "rights" that the law sought to defend and there can be no rights without some person or thing for them to attach to; and the law says that the person, company, firm or corporation or locality or traffic to which they attach must be a PARTICULAR PERSON, &c. The law refers to persons and things concrete, and not to abstractions, visions and shadows.

3. THE EVIDENCE AS TO DISCRIMINATION.

It abundantly appears that the relator Bullitt was offered the same terms of freight that were offered to the public. (Record p. 11.) His view was that the transaction between the Chesapeake and Ohio Railway Company and the New York, New Haven and Hartford Railroad Company "is a discrimination against *all the other coal produced in the district,*" and he alleged that this prevented him from moving the coal in the Kanawha District which had been offered to him "at a price which is very

attractive to him." He does not state what that attractive price was and the complaint of the Interstate Commerce Commission utterly ignores this portion of his affidavit filed before them.

The conception of the court, therefore, that "some or all of the persons concerned with the Kanawha coal destined for points beyond the Capes other than that for the New Haven Company, were subjected to an undue disadvantage," was formed without the discovery or the suggestion of any particular one of these "some or all;" and they remain as only the shadows of imagination.

Farther than this there is plenary proof that the operators in the Kanawha District, instead of being sufferers by the transaction between the two railroad companies, were beneficiaries thereof. When President Ingalls was making his "entirely honest effort to find a market for the coal produced on his line," as declared by the Court, he was giving the benefit to the operators of the Kanawha District of the transaction had with the New York, New Haven and Hartford Railroad Company.

It was widely known amongst them and was availed of by practically all of the operators of the New River District. See Hotchkiss Affidavit p. 124; Thomas Affidavit p. 124–7.

The contract was known as a public matter to everybody interested in the coal fields; was regarded as favorable to the Chesapeake and Ohio Railway Company; it was executed so completely without discrimination of any kind against any shipper or miner of coal, or against any coal or class of coal produced in said district, that no injury was occasioned thereby to the affiant Garrison, who testifies, or to the business of any other mine operator so far as this affiant knows or believes. (Record p. 130.)

Samuel Dixon testified that the transaction was of common knowledge not only as to the shortage of the sixty thousands tons but as to how it was going to be supplied; and that "said agreement to supply the Kanawha coal worked no discrimination against the operators in the New River Field." (Record p. 133.)

Justus Collins testified that the whole transaction was well understood in both the New River and Kanawha Districts; that it worked no discrimination against either field; and that it was regarded by the coal operators as a most favorable and beneficial arrangement for the New River District and continued to be for at least three years of its existence. (Record p. 136.)

D. T. Evans testifies that the transaction was widely known along the Chesapeake and Ohio coal fields ever since it was made; and that deliveries of coal by the Kanawha Fuel Coal Company worked no discrimination whatever against his company, which was the Mount Carbon Coal Company. (Record p. 137.)

James Kay testifies that he did not desire to participate in the delivery of the sixty thousand tons of shortage and that the transaction worked no discrimination against the companies represented by him, three in number. (Record p. 138.)

E. P. Mucklow testifies that he is treasurer of two companies and that no discrimination whatever was worked against the coal of these companies. (Record p. 140.)

R. B. Cassaday testifies that the contract was a matter of common knowledge among every one interested in coal mining in the New River and Kanawha coal fields; that though his company in the Kanawha District did not care to share in the transaction it worked no discrimination whatever against the mines represented by him. (Record p. 141.)

D. A. Nease testifies as the President of the Kanawha and Coal River Coal Company that he had opportunity to share in the transaction but did not desire to do so; and that no discrimination whatever was worked against the coal of the mines represented by him. (Record p. 142.)

J. R. Clark, whose mines are in the Kanawha District, did not care to participate in the transaction but affirms that no discrimination was worked against the mines represented by him. (Record p. 143.)

It is therefore evident that the imputation of discrimination by the transaction in question against "some or all of the persons concerned with Kanawha coal destined for points beyond the Capes," is not only unfounded but overwhelmingly disproved. In fact every thread of evidence in this case demonstrates the pervasive knowledge of the contract—the openness of it to general participation of the operators of the only place held to be discriminated against; and the proof of the negative is in the record, with only a vague imagination against it which can neither discover or suggest the name nor describe the particular person, company, firm, corporation, or locality or species of traffic which has been either preferred or prejudiced in any respect whatsoever.

e. THE ERROR IN THE CIRCUIT COURT'S OPINION

With all respect to the eminent, able and industrious judge who presided over the Circuit Court, the conclusion is forced upon our minds by the perusal of his elaborate opinion that its fundamental error lies

1st. In not separating the advantages which must necessarily belong to the stimulation of trade and must necessarily and wholesomely attach to those who become wisely associated in it from that other class of advantages which flow from sinister devices and from improper considerations. An undue advantage must be founded upon an improper consideration. No improper consideration of any kind is suggested for the contract herein considered.

2nd. To hold that it would be possible for some one to suffer because of a particular transaction does not of necessity thereby make that transaction a discrimination of any kind such as the law has noticed or can notice. For, in fact and in legal contemplation, no person can suffer from a transaction which is honest and legal. If a railroad company takes away its works and track from a station, holders of property located in the abandoned vicinage must suffer. If a railroad company puts its shops or tracks at any place, adjoining property holders of necessity derive an advantage. But any loss suffered on the one hand is *damnum absque*

injuria or rather is no damage at all in legal contemplation; and on the other hand any benefit derived is no discrimination.

The transaction in this case, we must not forget, has been sustained in all its parts as a legal transaction without motive of wrong and as in itself involving no wrong. Its collateral and incidental effects are totally severable by law from its nature. Whether they may possibly prove disadvantageous to one person or advantageous to another is a mere question which arises inevitably out of all great transactions and is totally without the pale of legal jurisdiction.

The conception of the Court below that some or all of the persons concerned in the particular traffic with Kanawha coal destined beyond the Capes other than that for the New Haven Company was subjected to undue disadvantage can derive no reinforcement from effort to discover those persons in New York or New England, or from the considerations adduced in the opinion of the Court that by losing 23 cents per ton in actual deliveries of coal to the New Haven Company the Chesapeake and Ohio Railway Company thereby gave an undue advantage to that company or prejudice or disadvantage to those concerned in other coal that went to New York or New England from the West Virginia mines. In considering this view of the Court we call attention to the fact that the case made by the Interstate Commerce Commission predicates the wrong doing by the Chesapeake and Ohio upon the carriage of freight

> "between the Kanawha District in the State of West Virginia and Newport News in the State of Virginia at less than its published rates on file."

The case that ended in the complaint at Newport News in Virginia is, in the opinion of the court, translated to an unknown locality, to unspecified traffic, and to some person unknown somewhere in New England, provided he is anywhere. The case that comprehended only freight rates and which could be computed by a simple sum in addition and subtraction, becomes, in the juridical view, a vague, immeasurable and indefinable case of preference and

prejudice which can find no expression in figures, has no metes and bounds of operation, and no reference whatever to the gravamen of its own statement. Nor is the case made by the court one that could by any possibility have been made consistent with the clear and lucid principles which the court had previously declared. When it held that there was no device in the case, nor intent to do wrong and in point of fact no wrong actual or constructive with respect to freight rates, it covered the whole ground of its jurisdiction; for that was alike the matter which the statute tied to the freight rate when it prohibited discrimination and also the matter distinctly set forth in the complaint.

When the Court declares in its opinion that every conceivable case of preference or advantage given by a carrier to "*one person*" or prejudice caused to be suffered by "*some one else*" is forbidden by the 3d section of the Interstate Commerce Law, it looks in vain to find, or to hear of that one person who was preferred and the "*some one else*" who was prejudiced or might conceivably have suffered is not even an unknown person in an iron mask. Imagination may conceive many persons and many things but until a distinct person has conceived of a particular wrong which he describes and of a particular person who did that wrong or suffered that wrong it is as impossible for a case to be made in court of his imagination as it would be to build a house without material, or as of old "to make bricks without straw."

f. THE REAL QUESTION INVOLVED.

The upshot of the matter is that the question which presents itself for decision is whether or not a carrier acting in good faith and with entire honesty and making a contract unquestionable in its legal aspects, can by the mere fact that it loses upon that transaction thereby pass into a stage in which such loss may be legally regarded as an undue preference or advantage to the party which gets the benefit of such loss or an undue prejudice or disadvantage to some unknown party who has not participated in the transaction?

To state this question is to answer it. Were it answered affirmatively a legal principle would be affirmed which would render it impossible for a carrier doing unquestioned things to know until a final settlement of accounts whether the law had been violated or not. No standard can be possibly raised by which it could be known beforehand whether there would be profit or loss and, consequently, none by which it could be known whether the law was, or might be, violated or not. The vice of the principle invoked lies in the fact that a damaging preference or prejudice or discrimination is imputed to some unknown person as flowing from a transaction in itself legal; and in relating back from the event of a transaction a characteristic ascribed to it which did not exist when it took place and which could not by any possibility be foreseen.

The laws of the Roman tyrant, hung up so high and written so fine that none could fairly read them, would not be so oppressive as a law of wrongdoing involved in the inscrutable mysteries of futurity and chance which no human mind could explore, and which must forever remain unknown to the greatest intellect and to the purest heart as well as to the stupid and wicked.

The exercise of rights cannot be the cause of legal damage. Only wrongs can create damage in the contemplation of the law. Whatever detriments may flow to any person from things honest and legal in themselves are not damage but mere liability to the accidents of fortune and to the incidents of life which inevitably attend on human concerns. Illegality must exist and damage must flow from specified illegality in order to give status in court to any complainant. That complainant must appear and show himself to be the party upon whom the illegality has operated and upon whom the damage has been inflicted; or else the agencies of the law must show the illegality to exist as a menace of wrong before any court can take jurisdiction of it.

There can be no wrong arising from any preference or any advantage which casually or incidentally flows out of contracts

legal and honest in themselves, for the reason that they are not undue. Neither can any person claim for himself, or the law claim for any person, that he has been prejudiced or disadvantaged from the granting of a preference or advantage that is not undue to another. It is the undue thing and only the undue thing that is prohibited in the Interstate Commerce Act.

The undue thing is "that which is not right;" "not legal or lawful;" "improper," as Bacon says, quoted by Webster in his Dictionary.

This is the sense in which the word 'undue' is used in the statute and is the natural interpretation thereof.

PART IV.

THE INJUNCTIVE ORDER SOUGHT BY THE INTERSTATE COMMERCE COMMISSION.

An inspection of the record will disclose that after the Court below had rendered its opinion in the case and filed the injunctive decree restraining the defendants from in any manner seeking to carry out the contracts held to be void, counsel for the Interstate Commerce Commission moved the Court to enlarge the terms of the decree so as to prohibit the said defendants from further or other breach of the Interstate Commerce law. (See Record pp. 229 and 241.)

This motion was overruled by the Court and it is with particular reference to this decision of the Court below that the Interstate Commerce Commission has prosecuted a cross appeal. Reference to the assignment of errors on the part of the cross appellant discloses the weight and importance it attaches to this feature of the case.

We confidently maintain, however, that the Court below correctly overruled the motion for the enlargement of the injunctive decree.

1. AN INJUNCTION MUST BE SPECIFIC.

It is a general principle of equity jurisprudence that every decree of a court should be specific and certain in its character; and that it should clearly apprise the parties to the proceedings

of their rights and duties thereunder. This is particularly true of injunctive orders whereby parties are directed to the performance or are restrained from the performance of specific acts.

a. DEFINITIONS.

This idea of certainty and definiteness is exemplified by the very definition of the term.

> "An injunction is a judicial process issuing out of a court of chancery, whereby a party is required to do or to refrain from *doing a particular thing.*" 16 Am. and Eng. Ency. of Law, p. 342.
>
> "A writ of injunction may be described to be a judicial process, whereby a party is required to do *a particular thing* or to refrain from doing *a particular thing,* according to the exigency of the writ." 2 Story's Equity, 861.
>
> "Its office is to require a party to do or to refrain from doing a *particular thing* according to the exigency of the occasion as indicated on *the face of the writ.*"

See

Spelling on Injunctions, sec. 3.
Anderson's Law Dictionary—'Injunction.'
High on Injunctions, sec. 1.

As is seen, all these definitions ascribe to an injunction the character of an order definite and specific in its terms. The decisions of the courts are likewise quite uniform in announcing that principle of equity jurisprudence.

b. JUDICIAL DECISIONS.

In *Robinson* v. *Clapp*, 65 Conn. 365, the Court said:

> "The Court also erred in granting an injunction in so indefinite terms. It is impossible to lay down any precise rule of universal application upon the subject. But the person enjoined is entitled to know with reasonable certainty what acts he may and may not do without making himself liable as in contempt of an order."

And in *Lyon* v. *Botchford*, 25 Hun. 57, the Court said:

> "The injunction order . . . should show upon its face all those things which it is necessary for the defendant to know

in order to obey it, and should plainly indicate to the defendant specifically all the acts which he is thereby restrained from doing, without calling upon him for inferences or any conclusions only to be arrived at by a more or less uncertain process of reasoning and about which the parties might well differ in opinion either as to the facts or law. The act prohibited must be the doing of some tangible or distinct thing or series of things, to be clearly pointed out and described."

See also

Sullivan v. *Judah*, 4 Paige 444; *Moat* v. *Holbein*, 2 Edw. Ch. 188.

The doctrine is well stated also in *Laurie* v. *Laurie*, 9 Paige Ch. (N. Y.) 235, as follows:

"As the defendant is bound to obey the process of the Court at his peril, the language of the injunction should in all cases be so clear and explicit that an unlearned man can understand its meaning, without the necessity of employing counsel to advise him what he has a right to do to save him from subjecting himself to punishment for a breach of the injunction."

A case directly in point is *Southern Pacific Co.* v. *Colorado Fuel and Iron Co.*, reported in 42 C. C. A. Rep. 12. In that case a decree was entered by the Circuit Court to the following effect:

"First, that the defendants be enjoined and restrained from further continuing to violate and disobey the Interstate Commerce Act, and particularly to abstain from violating the order of the Interstate Commerce Commission of November 25, 1895, the substance of which order has been heretofore stated;

"Second, that the defendants be enjoined and required, in respect of complainant's traffic (between points named) to cease and desist, on and after March 25, 1899, from unjust and unreasonable charges, or from demanding a greater compensation for service to be rendered complainant than they charge other persons for a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, or from giving undue and unreasonable preference and advantage to particular persons, corporations, and localities at

> Chicago, Ill., and elsewhere eastward of said city, or from subjecting the complainant and its traffic to undue and unreasonable prejudice and disadvantage and unjust discrimination, or from preventing the complainant from having its interstate traffic moved upon terms and conditions as favorable as those given by them for like traffic under similar conditions to other shippers; . . ."

Upon appeal, the Circuit Court of Appeals reversed the decree and ordered the bill dismissed. In discussing the decree, Thayer, J., said:

> "Such an order does not give any additional sanction to the statute; neither does it forbid the doing of any specific acts. It simply leaves the questions whether the threatened rate is reasonable, or whether it would operate as an undue preference or as an unreasonable discrimination, to be tried and determined in a proceeding for contempt before a chancellor, instead of being tried in the usual way before a court and jury, in an action for damages, after the rate has been exacted or actually demanded on a tender of property for shipment."

And in a recent case in this Court, Mr. Justice Holmes, delivering the opinion of the Court, and after commenting on the vast scheme alleged in the bill and the new problem in pleading presented by the case, which made it difficult for the Courts to deal with such cases without departing somewhat from accepted ideas of injunctive orders, said:

> "On the other hand, we equally are bound *by the first principles of justice* not to sanction a decree so vague as to put the whole conduct of the defendant's business at the peril of a summons for contempt. We cannot issue a general injunction against all possible breaches of the law."

And again:

> "The defendants ought to be informed as accurately as the case permits what they are forbidden to do. Specific devices are mentioned in the bill and they stand prohibited. The words quoted are a sweeping injunction to obey the law, and are open to the objection which we stated at the beginning that it was our duty to avoid."

Swift and Co. v. *U. S.* (October term 1904.)

2. THE DECREE ENTERED IN THIS CASE AND THE AMENDMENT ASKED.

So far as the terms of the injunction order that was entered in the case at bar is concerned, assuming that the case was correctly decided by the Court below, it complies with the requirements for injunctive orders as laid down in the authorities above cited and is without objection. The enlargement urged by the Interstate Commerce Commission, however, would violate the "first principles of justice" mentioned by Mr. Justice Holmes.

Under the first assignment of error filed by the Interstate Commerce Commission, it is contended that the injunction

> "should have enjoined and restrained the N. Y., N. H. and H. R. R. Co. and its officers and agents from seeking or accepting in any manner any direct or indirect rebate of the duly established freight rates of the C. and O. Ry. Co. on any interstate commerce, and from seeking or accepting in any manner from said railway company any undue or unreasonable preference or advantage."

In other words the contention is that the Court should say to the New Haven Road:

> "You must not seek or accept any direct or indirect rebate of freight charges from the Chesapeake and Ohio. Nor must you seek or accept any undue or unreasonable preference or advantage from the Chesapeake and Ohio. If you do, this Court will punish you for contempt."

It sounds much more specific and certain upon first reading than a careful consideration of its terms discloses it to be.

What constitutes a rebate of freight charge? What constitutes an undue or unreasonable preference or advantage? These are questions that have puzzled the brightest of our judicial minds. They are questions about which reasonable men, and even learned judges, may very properly and very honestly differ in opinion. Yet the effect of such an order as is contended for would be to compel the New Haven Road to determine the nice question (as it might be and often is) in advance. And moreover it would compel it to determine that question just as the

particular Court below would determine it, under pain of contempt. The fact that learned counsel had been called in to advise would be no defense. The fact that another court had determined the question a particular way would be of no avail to relieve the New Haven Road from liability for punishment for contempt.

It seems to us that the mere statement of this obvious result carries with it conviction that the proposed order is too broad and sweeping.

3. THE ELKINS ACT.

But, it was urged on the part of the Interstate Commerce Commission in the Court below, the Elkins Act was enacted to provide just such injunctive relief as is sought in this case. We submit that the language of the Elkins Act is not properly susceptible to such construction.

That Act provides:

> "And upon being satisfied of the truth of the allegations of said petition said court shall enforce an observance of the published tariffs or direct and require a discontinuance of such discrimination by proper orders, writs, and processes . . ."

The Elkins Act thus conferred upon the federal courts original jurisdiction to consider alleged violations of the Interstate Commerce Law without waiting, as was necessary before the Elkins Act was passed, for an investigation and order by the Interstate Commerce Commission. The above quoted language conferred upon these courts the power to enforce "an observance of the published tariffs" and to "require a discontinuance of such discrimination." How? By "proper orders, writs, and processes." What are the proper orders, writs and processes? Clearly an injunction is to be included among them; but can it be held that any sort of injunction may be entered? Is there anything in the Act that would indicate that the courts are thereby given the power to enter orders without regard to "the first principles of justice?" Would an order that disregarded such first principles be a *"proper order?"*

Counsel for the Interstate Commerce Commission refer to the case of *U. S.* v. *Michigan Central Railroad Company*, 122 Fed. 544. In that case an injunction was granted somewhat like the injunction sought in this case. But there the injunctive order was a temporary order entered without objection pending a hearing on the merits. Moreover, in that case the bill charged a conspiracy and combination on the part of the defendants for the purpose of preventing competition, to sustain freight charges, and to circumvent the interstate commerce law. It was not a single transaction that was involved but a whole system of rate charging growing out of, as alleged in the bill, a conspiracy and combination to violate the law.

Considerable weight was likewise attached to the decision in the *Debs Case*, 158 U. S. 568. But that case furnishes no parallel. There the bill charged a conspiracy to effect certain unlawful purposes. The facts were alleged and proved. As Mr. Justice Brewer said, the proceedings were in the nature of a bill to keep the peace, and the conditions called for the "fullest exercise of the Court's power." It was an unusual case, calling for an unusual remedy. Vast interests were involved, both public and private, and the acts enjoined had been threatened and were alleged to have been threatened.

In the present case, nothing of the sort is either alleged or proved. The transaction out of which this case grows was a simple, single, isolated contract, disconnected with any other contract or system of business. It was free from intent to violate the law, much less was there any threat or declared purpose so to do.

And even if in any case an injunction such as the Interstate Commerce Commission urges could properly be entered, this is not such a case as would justify it. It is a clear principle of equity jurisprudence, no less well founded and no less well settled than the one above discussed, that to justify an injunction,

"The injury threatened must be actual and *impending*. A party seeking this remedy must show not only clear legal right, but a well grounded apprehension of immediate injury to such right."

Spelling on Injunctions, sec. 12.

And in section 18 the same author says:

"An injunction is never granted except for substantial reasons founded on actual interest. Nor is an injunction justified by the fact that if there be no intention on the part of the defendant to do the acts feared the injunction can do no harm. The court will not interfere unless the evidence shows a *probability of defendant doing the act which it is sought to restrain.*"

It was in obedience to this very principle that this Court, in the case of *Swift and Co.* v. *The United States*, restricted the injunctive decree to the very violations of law alleged in the bill to be contemplated and threatened. This is shown by the last paragraph of the opinion by Mr. Justice Holmes, in which he says:

"It only remains to add that the foregoing question does not apply to the earlier sections, which charge direct restraints of trade within the decisions of the Court and that the criticism of the decree as if it ran generally against combinations in restraint of trade or to monopolize trade, ceases to have any force when the clause against "any other method or device" is stricken out. So modified it restrains such combinations only to the extent of certain specified devices, which the defendants are alleged to have used and intend to continue to use."

There is no allegation in the petition in this case that the defendants have any intention of violating the Interstate Commerce Act. There is not one particle of evidence that even tends to prove any such intent on the part of either of the defendant companies. Yet it was urged by counsel for the Interstate Commerce Commission that the injunction sought should be entered because the defendants had been shown to be "violators of the law." But there is nothing in the record to support such a charge. So far from being violators of the law in the sense that

is suggested by the use of such a term, the whole case discloses but a single transaction which the lower court holds to be a violation of the law. And this transaction was held to be a mere technical violation, unintentional on the part of the defendants. Such a single transaction and of such a character surely cannot render the defendants violators of the law so as to require an unusual and extraordinary decree to keep them peaceable and law abiding.

The power of injunction has been called the strong arm of the law; but its strength is never exerted in the way of punishment. It is used only to restrain. When so exerted it has fully served its purpose; a step beyond and it becomes punitive.

PART V.

THE OPTION IN THE CONTRACT OF 1896.

The seventh assignment of error by the Interstate Commerce Commission is as follows:

> "The Court should have held that the contract of Dec. 3, 1896, between the C. and O. Ry. Co. and the N. Y., N. H. and H. R. R. Co., was an option to the N. Y., N. H. and H. R. R. Co. to take within five years any amount of coal which it may want, not to exceed two million tons, and not exceeding 400,000 tons per annum, and the Court should have held further that the C. and O. Ry. Co. had the option on July, 1, 1902, to cancel all portions of said quantity of coal remaining undelivered." (See Record p. 243.)

Much stress was laid by counsel for the Interstate Commerce Commission, in the argument below, on the exact wording of the original contract of December 3d, 1896. An examination of the *fac simile* on page 190 of the Record will show that it was typewritten on a regular printed form of the New York, New Haven and Hartford Railroad Company. It will be noted that wherever the contract is in typewriting the word "*railway*" company is used throughout. When the Chesapeake and Ohio is intended those words are used as a prefix. When the New Haven Road is intended it is simply written "railway company," and each time it is so used it follows closely upon the printed reference to the

New York, New Haven and Hartford Railroad Company, making the reference all the more clear and certain.

It was pointed out by counsel for the Commission below that the Chesapeake and Ohio is a *Railway Company* while the New Haven is a *Railroad Company*. It is true that the corporate names show this distinction. But it is the well known custom and habit of people generally to use the terms 'railway' and 'railroad' interchangeably. The Century dictionary declares them to be synonymous terms and it is doubtless true that the word railway was used throughout by the typewriter without regard to the technical corporate names of the contracting companies.

However, an examination of the contract shows that the New Haven Company is intended in each instance that "railway company" is used without any prefix. The first instance is in the clause of the contract which reads as follows:

> "And said railway company has the right to terminate this contract at any time if said bituminous coal be of poor quality or if its delivery be unnecessarily delayed."

Obviously this was intended to give the right of termination to the New Haven Company. It would be absurd to suppose that this contract by which the Chesapeake and Ohio undertook to furnish coal should give to that company the right to terminate the contract on account of the poor quality of its own coal which it was to furnish or on account of the delay in its own deliveries.

As the Court below said in its opinion:

> "It is true that the contract gave the New Haven Company an option as to the amount of coal (not exceeding the stated limit) it might order. But I think this clause was intended to cover the contingency of an order being made by the New Haven Company, and the coal on delivery being of poor quality or the deliveries being unduly delayed." (Record p. 213.)

Indeed, it would be difficult to give it any other rational construction.

The second instance is in the clause which reads:

"Said railway company has the right to cancel any and all portions of said quantity of bituminous coal remaining undelivered on July 1st, 1902."

It is equally obvious that the New Haven Road is given this right of cancellation. The Chesapeake and Ohio undertook to deliver coal within a certain period. If it did not deliver it within that period the right to cancel undelivered portions was given to its contractee. It would be absurd to suppose the Chesapeake and Ohio could undertake to furnish coal within a certain time and then elect whether or not it would do so and cancel its obligations by such an election.

The reasonable intendment is clear, and the course of dealing between the parties to the contract comports therewith, that if the Chesapeake and Ohio did not deliver the coal called for in the monthly requisition by the date set as a limit, the New Haven Road was given the privilege to refuse to accept the deliveries after that date. And while the Court below follows a somewhat different course of reasoning, it reaches practically the same conclusion.

CONCLUSION.

The Public and Commercial Necessity for Long Term Contracts for Coal.

In any consideration of this transaction the time at which it was made, the conditions under which it was made, and the gigantic nature of the commerce and industry of the country which have rendered such transactions indispensable to society, should not be overlooked. The time was one succeeding crisis, when strikes, lockouts and paralysis of trade had deeply affected the whole nation. The conditions which had produced all manner of disorders were starvation and cold and riot and murder menacing the great centres. To stop coal or bread in a city was to organize anarchy.

The New York, New Haven and Hartford Railroad Company is a great company, moving thousands of tons of freight and thousands of passengers per day. It could not feed itself from

hand to mouth as a citizen may from the corner grocery. It could not fire its engines as a man may light a match taken out of his vest pocket. A day's stoppage of its trains meant far more than ruin to itself. It meant paralysis to commerce; to the mails of the United States; to the bread of families; to remittances to and from banks; to pensions for invalids; to medicine for the sick; to concerns which embraced everybody of the human society to be served, and everything that concerns society. It meant distraction and damage. To provide coal for its enormous and myriad transactions the company had to make great contracts. From the train between Boston and New York with its thousands of passengers and its thousands of tons of freight, to the mines of West Virginia with its thousands of miners and operatives; from the poor woman at her kitchen fire with her crying children around her to the mighty factory with its blazing furnaces and its whirring wheels; from the hospital with its wan patients to the excursion from the crowded city for a breath of fresh air; there was widespread distress and danger impending. Both the Chesapeake and Ohio and the New Haven roads were in the immediate menace of that danger, not only to their investors, not only to their customers, but to their very structure, should the panic come which every good heart and which every honest mind prayed might be averted.

The "*modus vivendi*" and efforts of orderly living were the things to be subserved by every energy that could be put in operation. When honest energies without device, and honest intellects without guile, provided to meet the present necessities in a way that the law could not question, it would seem like desecration of law and an invocation of "Evil, be thou my good," to impute UNDUENESS to practical and honorable things that were done, or to regard as a disadvantage to anybody, *in esse* or *posse*, the accomplishment in righteous ways of righteous ends in view.

Coal is one of the great and absolute necessities of a railroad. It must be constantly on hand in large quantities. It is a necessity, created by their situation and conditions. A railroad

company should have a steady supply coming in through a regularly organized channel. This necessity has been met in the past by the New York and New Haven Company by purchases from coal dealers covering large quantities of coal and considerable periods of time. The contract with the Chesapeake and Ohio Railway Company was a contract of this identical character.

Now, if the reasoning of the lower Court is sound, then such contracts can no longer be made with safety, however clothed with legality. If the validity, legality, fairness and commercial wisdom of a contract at the time of its execution do not give it a character that will survive changing commercial conditions, then indeed must the New Haven Road and other railroad companies tremble for the constancy and volume of their coal supply, and for the stability of their institution and its business. The commerce and the welfare of the people must tremble with them.

The Court below said in its opinion:

> "While a carrier may become a dealer in articles of transport, and can sell (and consequently can contract to sell) such articles at a price which pays, or practically pays, the cost items and its own published freight charges, yet whenever the cost items so substantially rise that the loss to the carrier (as a dealer) and the subsequent advantage to the purchaser consignee, or the disadvantage to someone else, becomes unreasonable or undue, such sales become (or such contract becomes) illegal. When such a state of fact comes to exist the carrier must plead the illegality of the transaction and cease to perform." (Record p. 225-226.)

We are aware that it is considered unfortunate to be at the losing end of a contract. But it is new doctrine that it is also unlawful to suffer loss in a business transaction. We do not think this Court will lend itself to the enunciation of any such doctrine. If the carrier vendor must cease to perform its contract of sale as soon as it becomes unprofitable, is the purchaser consignee entitled to the converse privilege of avoiding the contract if changing commercial conditions place it at a disadvantage

and the carrier vendor in a more profitable situation? One would seem to be just as fair and reasonable a proposition as the other. And the ultimate result of such a doctrine would be to render all such contracts as is involved here dependent for their legality upon the stability of market prices, labor, wages and other cost items which, in the nature of things, vary almost daily. A contract would then become a fast and loose affiair, without sanction.

In the account of profit and loss at the end of the transaction, which might have been one of profit all along, both to the Chesapeake and Ohio and to the New Haven Road, we cannot write damage to some person unknown when no one who is known suggests damage. Nor can we regard either the possibility of eventual loss or its actuality as relating back and seizing hold of a transaction which sometimes resulted in gain and might all the time have resulted in gain.

Livy has a fine sentence in speaking of a certain character in which he says: "*Adparebat quo nihil iniquius est ex eventu famam habiturum.*" He contemned the character to whom the accident of fortune had given fame. Here the Court is asked to watch the sliding scale of profit and loss; to arrest the contractor the moment the loss mark is reached; to ascribe to the transactions of commerce, which always float on the choppy and tumultuous sea of changing conditions, a shifting standard as elusive and misleading as it is impracticable and unjust.

The following sentence of the Court's opinion, it would seem to us, shows the correctness of this view. The Court says:

> "While a carrier may become a dealer in articles of transport, and can sell (and consequently can contract to sell) such articles at a price which pays, or practically pays, the cost items and its own published freight charges,"

Now mark the qualification:

> "yet whenever the cost items so substantially rise that the loss to the carrier (as a dealer) and the subsequent advantage to the purchaser consignee, or the disadvantage to someone else, becomes unreasonable or undue, such sales become (or such contract becomes) illegal." (Record p. 225.)

Thus while it is admitted that the contract was wholly unimpugnable when made, and for all the time in which the cost items of the coal and the published freight charges due the Chesapeake and Ohio were covered by the price received from the New Haven Road for the coal delivered, it is also urged that it became, in the view of the court, impugnable when the cost items for the coal to the Chesapeake and Ohio were such that the loss to that company in the selling of it, and the subsequent advantage to the New Haven Road, or the disadvantage to someone else became "UNREASONABLE" or "*undue.*" In short, although right "reason" and all "dueness" may pervade a contract, if times and prices change, and the unexpected obtrudes itself on the losing side of the ledger, it at once paralyzes performance and knocks sky high all contracts that do not continuously and unceasingly prosper.

The court also gives its opinion that the carrier company had a right to "cease to perform contracts made in good faith whenever the cost of the article, or the other cost items, go to such a point that the contract price does not equal, or practically equal, the cost items and the carrier's published freight rates." IN OTHER WORDS, ALBEIT THAT THE FREIGHT RATES BE ALL THE TIME FULLY COVERED BY THE MONEY RECEIVED FROM THE COAL SOLD AND CARRIED, ALTHOUGH IN THE FREIGHT RATES THERE MAY BE NEITHER ACTUAL NOR POSSIBLE DISCRIMINATION AGAINST ANY PERSON WHATSOEVER, OR FOR OR AGAINST THE CARRIER ITSELF, THE GIST OF THE COURT'S OPINION IS THAT THE CARRIER CANNOT LOSE ON THE PRICE IT PAYS FOR COAL (ALBEIT ITS CHARACTER AS VENDOR IS UNASSAILABLE AND NOT JURISDICTIONAL EVEN TO THE FEDERAL COURTS) WITHOUT THEREBY GIVING AN UNDUE PREFERENCE TO SOME PERSON, OR INFLICTING AN UNDUE DISADVANTAGE UPON SOME OTHER PERSON UNKNOWN.

This view does not rest upon any principle of federal jurisprudence, upon any doctrine of common law, upon any question that is jurisdictional to this Court, and can only be reached by

obtruding into consideration a matter as alien to the validity of this contract as is the charter of either the Chesapeake and Ohio or of the New Haven road. Neither does it rest upon the law of trade or the essential nature of trade, for no law of trade—neither the law merchant nor any new custom or habit of trade—ever has looked, or ever can look, to profit and loss accounts of a vendor to impugn a transaction which was legal and honest when entered into.

The States of this Union are forbidden to impair the obligation of contracts. Contracts valid and legal are vessels which hold vested rights; holy vessels, we may call them, for they contain sacred obligations. They are enshrined and defended in the Constitution of the United States against the hand of any State whatsoever. It is neither to be presumed or imagined that Congress—representing the jurisprudence of a nation whose common law and public spirit, and whose entire jurisprudence indeed, considers a right vested a right sacred—designed in a statute to smash contracts rightful in their inception and which are honest in their nature the moment they cease to be profitable to one of the contractors; or to make the contractor himself the judge of the time when they so cease to be profitable; and enable him to repudiate them as soon as the line drawn left him on the losing side.

The refined process of reasoning by which the eminent judge below concludes that Congress has done this could only be sustained by imparting to words a strained and unnatural meaning and extending their significance beyond the range of a fair and just contemplation.

The whole question comes back to the character of the original contract and the subsequent contract which is but an extension thereof and dependent upon and based upon that original contract. The Chesapeake and Ohio Railway Company has a right, so far as this case or like cases may be concerned, to go into the coal business. If this be true then it has a perfect legal right to lose money in that business as it has to make a profit therein. It

does not matter whether the contract here involved was profitable or unprofitable, THE CHESAPEAKE AND OHIO ALWAYS GOT ITS FREIGHT RATE ON THE SHIPMENTS MADE UNDER IT. What the Chesapeake and Ohio as a coal dealer got for its share of the proceeds is not a question with which the federal statutes concern themselves. This is, of course, always assuming that the transaction, as here, is one of good faith and free from device to evade the law.

As Mr. Justice Day said in a recent case in this Court:

> "It may be that the Commission or the courts will ultimately find that these contracts do not fix the compensation received by the carriers, and that, as claimed, the full rate is paid by these purchasing companies, and if there is a loss on these contracts it is made up in other business . . ."
>
> *Interstate Com. Com.* v. *Baird*, 194 U. S. p. 44.

We submit respectfully that this Court should, certainly upon the facts in this particular case, hold as Mr. Justice Day intimates.

And we believe it will hold that the Chesapeake and Ohio Railway Company realized at all times its regular published freight charges; and that so far as this case is concerned, no other question is involved.

We have argued this phase of the case as if it were properly before the Court. In fact we do not think it is, as it is not within the allegations of the petition. That has been sufficiently considered.

The injunction should be dissolved and the case remanded with instructions to dismiss the petition of the Interstate Commerce Commission.

Respectfully submitted,

JNO. W. DANIEL,
FRED HARPER,
Of Counsel.

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Supreme Court of the United States,

OCTOBER TERM, 1905.

No. 24.

NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

Appellant,

versus

INTERSTATE COMMERCE COMMISSION,

Respondent,

INTERSTATE COMMERCE COMMISSION,

Appellant,

versus

NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY *et al.*,

Respondents.

BRIEF FOR NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY.

JOHN W. GRIGGS,

Counsel.

HAMILTON PRINT, 12 BARCLAY STREET, N. Y. TELEPHONE, 3873 CORTLANDT.

Supreme Court of the United States,

OCTOBER TERM, 1905,

No. 24.

NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

Appellant,

vs.

INTERSTATE COMMERCE COMMISSION,

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INTERSTATE COMMERCE COMMISSION,

Appellant,

vs.

NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, *et al.*,

Respondents.

Brief for New York, New Haven and Hartford Railroad Company.

THE PLEADINGS.

This is a suit brought by the Interstate Commission against the two defendants under the third section of the Act entitled "An Act to further regulate commerce with foreign nations and among

the States," approved February 19, 1903. By that section it is provided:

> "That whenever the Interstate Commerce Commission shall have reasonable ground for belief that any common carrier is engaged in the carriage of passengers or freight traffic between given points at less than the published rates on file, or is committing any discriminations forbidden by law, a petition may be presented alleging such facts to the Circuit Court of the United States sitting in equity having jurisdiction."

In order to understand the exact nature of the issue it is necessary to examine carefully the allegations of the petition.

It alleges that the Chesapeake and Ohio Railway Company "is engaged in carrying freight traffic between the Kanawha District in West Virginia and Newport News in Virginia at less than its published rates on file, and is committing a discrimination forbidden by law."

The facts justifying this general allegation are stated as follows:

> "Petitioner states and charges that during the spring of 1903 the Chesepeake and Ohio Railway Company made a contract *to carry* a large amount of coal, to wit, sixty thousand (60,000) tons, from the Kanawha District of West Virginia to tidewater at Newport News, in the State of Virginia, *for shipment to New Haven for the New York, New Haven and Hartford Railroad Company*, for which said traffic the Chesapeake and Ohio Railway Company would realize for carrying the same from twenty ($.20) to sixty ($.60) cents per ton. At least, petitioner is informed and believes that the rate the Chesapeake and Ohio Railway Company will receive on this traffic, or is receiving on the

same, is far below $1.45 per ton, its published rate for carrying coal from the Kanawha District of West Virginia to tidewater, at Newport News, Virginia, for shipment beyond the capes of the Chesapeake.

"Petitioner further states that it is informed and believes that the Chesapeake and Ohio Railway Company is now engaged in carrying the 60,000 tons of coal aforesaid, and that out of that amount it has already carried and delivered at least 25,000 tons, *at a rate far below its published rate* aforesaid.

"Petitioner further says that it is informed and believes that the Chesapeake and Ohio Railway Company undertakes to justify its action in the premises on the ground that in 1896 a contract was made by the Chesapeake and Ohio Railway Company with the New York, New Haven and Hartford Railroad Company, by which the former sold and agreed to deliver to the latter two millions of tons of best quality of coal on or before the 1st day of July, 1902, delivery to begin July 1st, 1897, and not to exceed 400,000 tons per annum. The price to be paid by the New York, New Haven and Hartford Railroad Company to the Chesapeake and Ohio Railway Company for this coal was two dollars and seventy-five cents ($2.75) per ton on the New Haven basis.

"Petitioner says that it is informed and believes that during the life of this contract, up to and including the month of June, 1902 (after which time deliveries ceased), the Chesapeake and Ohio Railway Company had failed to deliver about 60,000 tons of coal, required by the contract aforesaid.

"Petitioner further says that it is informed and believes that this contract was illegal and void, and that the Chesapeake and Ohio Rail-

way Company had no power to make such a contract, and that the contract for this coal was at such a price that *the freight rate thereon to be received by the Chesapeake and Ohio Railway Company* during a considerable period covered by the contract, *was far below its published rates.*

"Petitioner further says that it is informed and believes that some months after the contract aforesaid had expired, the New York, New Haven and Hartford Railroad Company rendered a bill to the Chesapeake and Ohio Railway Company for something over one hundred thousand ($100,000) dollars damages for failure to deliver the coal called for by the contract aforesaid, and during the winter of 1902–'03 the President of the Chesapeake and Ohio Railway Company arranged, through a coal broker by name Wittenburg, and a coal operator in the Kanawha District by name Thomas, by which it was agreed that Thomas should ship 60,000 tons of coal from the Kanawha District to the New York, New Haven and Hartford Railroad Company, at $2.75 per ton, said coal to be delivered prior to July 31st, 1903."

After setting forth these facts the petition continues:

"The petitioner is informed, believes and charges that the Chesapeake and Ohio Railway Company in this transaction is *engaged* in the *carriage of freight traffic* between the points set forth above, at *less than its published rates on file*, and is committing a discrimination against all other coal produced in the Kanawha District of West Virginia, which said discrimination is forbidden by law."

The petition prays:

1st. That the defendants may answer.

2d. That the Court will enforce an observance on the part of the Chesapeake and Ohio Railway Company of its published tariffs in respect to coal, &c.

3d. That the New York, New Haven and Hartford Railroad Company be enjoined and restrained from accepting or receiving any rebate, concession or discrimination in respect of the transportation of any property in interstate or foreign commerce carried for it.

4th. That the Chesapeake and Ohio Railway Company be enjoined from doing anything whatever whereby coal or any other property shall, by any device whatever, be transported by it at a less rate than that named in the tariff published and filed by such carrier, or whereby any other advantage may be given or discrimination practiced.

The defendants answered separately. The answers set up substantially the same facts, and those facts are established by the proofs, and are also substantially found by the Court to be true, as stated in the answers.

STATEMENT OF FACTS.

The Chesapeake and Ohio Railway Company is a corporation of Virginia, operating a railroad extending through West Virginia and Virginia, terminating at Newport News. The New York, New Haven and Hartford Railroad Company is a corporation of Connecticut, operating a railroad extending through the States of Connecticut, Rhode Island and Massachusetts.

On December 3, 1896, these two companies en-

tered into a contract whereby the Chesapeake and Ohio agreed to furnish to the New York, New Haven and Hartford, not to exceed two million gross tons of bituminous coal from its line, in such quantities monthly as wanted from July 1, 1897, to July 1, 1902, and further agreed to deliver all said coal to the New York, New Haven and Hartford in its bins at such ports upon its line as required by monthly requisitions of its purchasing agent.

The New York, New Haven and Hartford agreed to pay for said coal at the rate of $2.75 per gross ton, New Haven basis, settlement to be made monthly (Case, pp. 6, 207).

Attached to the contract is a guarantee by J. Pierpont Morgan that the Chesapeake and Ohio shall not fail to deliver coal on account of strikes.

The Chesapeake and Ohio entered upon the performance of this contract, and annually made deliveries of the quantities of coal called for, rendered its bills for the same at the contract price, and was in due course paid for the same.

During the winter of 1900-'01 the Chesapeake and Ohio, by reason of strikes, were unable to make delivery of the full quantity of coal due under the contract for that year, and the New York, New Haven and Hartford was compelled to, and did, supply itself with large quantities of coal from other sources to make up said deficiency, for which it had to pay, and did pay, a greater price than that fixed by the contract. Thus, a just and legal claim for damages and reimbursement arose in favor of the New York, New Haven and Hartford against the Chesapeake and Ohio to the amount of $160,000, which claim was recognized and admitted by the Chesapeake and Ohio, and was settled and compromised by it by the payment of $130,000 in cash.

Again, in the year 1902, a general strike of coal miners paralyzed the coal industry, restricted the supply of coal, and enhanced enormously its price,

so that the Chesapeake and Ohio was unable to fully deliver the 400,000 tons of coal required for the last year of the term of the contract.

Again the New York, New Haven and Hartford had to go into the open market and buy coal for its purposes at a price greatly in excess of the contract, whereby another bill of damages was run up, amounting to $103,910.69, which represented the pecuniary loss sustained by it by reason of the failure of the Chesapeake and Ohio to deliver the full amount of coal due upon the last year of the contract. The number of tons of shortage for that year was 59,966.

The New York, New Haven and Hartford made claim upon the Chesapeake and Ohio for reimbursement for the said sum of $103,910.69, and the Chesapeake and Ohio, not denying its legal obligation under the contract and admitting its liability to make good the loss, especially in view of the guarantee attached to the contract, entered into negotiation with the New York, New Haven and Hartford for a settlement of the claim, and an agreement of settlement was arrived at, whereby, on account of the hardship of the case and because the non-performance of the contract was not due to the fault of the Chesapeake and Ohio, but to a condition of affairs over which it had no control, the New York, New Haven and Hartford agreed, instead of insisting upon the payment of the money damages, to accept in satisfaction thereof the delivery of the deficiency of 59,966 tons of coal at the same price named in the contract. When this complaint was filed the Chesapeake and Ohio was engaged in the performance of this compromise agreement and had delivered thereunder 33,915 tons, leaving 26,051 tons of the deficiency still to be delivered. It is the delivery of this balance of tonnage which the Interstate Commerce Commission seeks to enjoin and prevent.

The New York, New Haven and Hartford had no knowledge of or interest in the cost of the coal

at the mines, nor the cost or rate of transportation over the road of the Chesapeake and Ohio or from Newport News to New England by water.

POINTS.

I.

The learned Judge of the Circuit Court correctly found and decided that the Chesapeake and Ohio was, in fact, the vendor of the coal and must be treated as a carrier which purchased coal at its mines on its road for delivery to a purchaser in New England.

II.

The Circuit Judge also correctly found and decided that the contract between the two companies was made in good faith; that there was no intention to violate or evade the provisions of the Interstate Commerce Act, and especially that there was no intention to carry at less than the published rates.

III.

The Circuit Court also correctly found and decided that the provisions of neither the second nor the sixth sections of the Interstate Commerce Act had been violated. The Court held that unless the transaction was a ruse or device to carry at less than legal rates, or unless there was, directly or indirectly, a carriage at too low a rate, the provisions

of the second section did not apply, and that the loss suffered by the C. and O. on the contract could not be treated as carriage at too low a rate, as that would be to assert that the honest loss of the vendor-carrier must be treated as a reduction in freight rates, and not as dealer's loss, which would be incorrect.

IV.

The Court below erred in holding that the railroad companies, especially the N. Y., N. H. and H. R. R. Co., were violating the third section of the Interstate Commerce Act.

(*a*). Because the complaint, neither in express terms nor by just legal inference, alleged any violation of Section 3.

(*b*). Because, irrespective of the sufficiency of the complaint, the transactions in question did not constitute a violation of Section 3.

This is not a case of shipper and carrier, but of vendor and vendee. The contract is to sell and deliver. Carriage is merely incidental to the contract of sale, and not the principal obligation of the vendor. Transportation is necessary merely in order to deliver the articles sold into the hands of the buyer.

It was not the purpose and is not within the fair scope of the Interstate Commerce Act to hold that merely incidental carriage performed, not as a part of the transportation business, but as the part of the business of a dealer, is governed by the Act, where the transaction is honest and not intended as a ruse or device to defeat the statute and give undue or unreasonable preference or advantages to some particular person.

If Congress had intended to make the Commerce Act as broad and far-reaching as this, it would have used apt terms to express such an intention. The proper construction of the statue is that it applies to transportation as such when undertaken by a common carrier, exercising the functions of a carrier, and dealing, not with a vendee, but with a shipper of goods.

V.

Even if the arrangement did give an advantage to the N. Y., N. H. & H. R. R. Co., it was not, under the circumstances disclosed in the record, an undue or unreasonable advantage.

The contract of December 3, 1896, was not only made in good faith, but was intended to benefit generally all the producers of coal in the regions reached by the C. & O. The transaction was open and public, unobjected to for more than the full period of five years, and is objected to now only with reference to a very small proportion of the quantity of coal contracted to be furnished by the C. & O. to the N. Y., N. H. & H. The contract worked no injury to any shipper of coal.

VI.

The decision of the Circuit Court accords to the vendor in this case the right to cease to perform its contract of sale, made in good faith, whenever the cost of the article, or the other cost items, go to such a point that the contract price does not equal, or practically equal, the cost items and the carrier's published freight rates.

It is submitted that this is an extension by con-

struction of the Interstate Commerce Act, which is unjustified, unnecessary and impolitic.

The cases cited by the learned Judge as analogous are all cases where the contracts voluntarily abrogated by the carriers were contracts relating exclusively to transportation, and were made between the carrier and shippers of goods, not between the carrier and vendees.

The decree of the Court below, which practically forbids the N. Y., N. H. & H. from recovering damages on a contract of purchase honestly entered into, merely because it incidentally and collaterally may affect some shippers of coal on the line of the C. & O., is inequitable and unjust, and should be reversed and the complaint dismissed.

JOHN W. GRIGGS,
Counsel for N. Y., N. H. & H. R. R. Co.,
Appellant and Respondent.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1905.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, APPELLANT,
v.
THE INTERSTATE COMMERCE COMMISSION.
No. ~~253~~ 24.

THE INTERSTATE COMMERCE COMMISSION, APPELLANT,
v.
THE CHESAPEAKE AND OHIO RAILWAY COMPANY AND THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY.
No. ~~260~~ 27.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF VIRGINIA.

Brief for the Chesapeake & Ohio Railway Company.

J. P. BELL COMPANY, Printers, Lynchburg, Va.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1905.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, APPELLANT,
v.
THE INTERSTATE COMMERCE COMMISSION. } No. 254.

THE INTERSTATE COMMERCE COMMISSION, APPELLANT,
v.
THE CHESAPEAKE AND OHIO RAILWAY COMPANY AND THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY. } No. 260.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF VIRGINIA.

Brief for the Chesapeake & Ohio Railway Company.

STATEMENT.

This proceeding was begun in the United States Circuit Court for the Western District of Virginia by a petition in equity filed by the Interstate Commerce Commission on the 13th day of July, 1903, charging the Chesapeake & Ohio Railway Company with violating the Interstate Commerce Act by carrying coal in the months of May and June, 1903, for the New York, New Haven & Hartford Railroad Company "at less than its published rates on file and thereby committing a discrimination forbidden by law;" and charging the New York, New Haven & Hartford Railroad Company with receiving the alleged "rebate or concession upon the coal so carried for it knowingly," and "with acting equally in violation of law with the Chesapeake & Ohio Railway Company." The Court was asked by proper order against the Chesapeake & Ohio Railway Company and the New York,

New Haven & Hartford Railroad Company to "require their discontinuance of the discrimination alleged;" and an injunction, general in its terms, was prayed for to restrain the Chesapeake & Ohio Railway Company "from transporting *coal or any other property at less* than its published rates on file; or from doing *anything whatever* whereby any other advantage might be given or discrimination practiced;" and to restrain the New York, New Haven & Hartford Railroad Company "from accepting or receiving any rebate, concession or discrimination in respect to the transportation of *any property* in interstate or foreign commerce carried for it."

On the filing of the petition a temporary injunction was granted as prayed for. The respective defendants filed their several answers to the said petition denying any violation of the Interstate Commerce Act, and the cause was matured for hearing on affidavits and documentary evidence filed by the respective parties to the controversy.

Upon the hearing thereof, the Circuit Court, on February 19th, 1904, rendered its opinion, holding that the transaction complained of was *not* in violation of the 2d or 6th sections of the Interstate Commerce Act, as was contended, but *was* forbidden by the *3d section* of that Act. The Court also denied the prayer of the petitioner for a *general* injunction. A decree was entered in conformity with this opinion enjoining the defendants from further carrying out the contract between them under which the Chesapeake & Ohio Railway Company was delivering coal to the New York, New Haven & Hartford Railroad Company.

The contract which was made the basis of this proceeding originated as follows:

On December 3d, 1896, the Chesapeake & Ohio Railway Company, through M. E. Ingalls, its president, made a contract with the New York, New Haven & Hartford Railroad Company to furnish the latter company not to exceed 2,000,000 gross

tons of bituminous coal from mines along its line in such quantities monthly as wanted from July 1st, 1897, to July 1st, 1902, deliveries to be made in its bins on its line and not to exceed 400,000 tons per annum, at an agreed price of $2.75 per ton New Haven basis, settlements to be made monthly. The average price under this contract was $2.831 per ton. (See record p. 77.) A lithograph copy of this contract will be found on p. 190 of the record.

In July, 1897, the Chesapeake & Ohio Railway Company entered upon the discharge of this contract having previously arranged on December 11th, 1896, to obtain the coal from certain operators on its line in what is known as the New River District in West Virginia, at 70c per ton and subsequently, in April, 1898, having arranged with the Atlantic Transportation Company for water transportation from Newport News, Va., to New Haven, at 50c per ton. (See record pp. 69-72 and affidavit of M. E. Ingalls, record p. 112.)

When this contract was made it yielded about $1.35 per ton net to the Chespeake & Ohio Railway Company over all costs incident to the purchase and delivery of the coal; this was a handsome return, substantially equal to its share of its then existing *through* rate on coal destined beyond the capes, and in excess of its *specific* rates on similar coal subsequently fixed to Newport News, up to April 1903; and averaged a net return per ton to the Chesapeake & Ohio Railway Company of 98 1-2c throughout the life of said contract, including May and June 1903; this latter sum, in view of the magnitude of the tonnage called for by the said contract, bore a just relation to any tariff on similar coal on the line of the Chesapeake & Ohio Railway Company for Tidewater shipment.

The lower Court in holding that the contract was free from objection on this score said:

> "In the case at bar I am unable to find evidence of an intent to carry at less than the published rates of the C. & O. (Record p. 221.)

This contract was made at a time of extreme financial depression. In order to promote the interest of the Chesapeake & Ohio Railway Company and to help sustain the mines along its line the President of said Company sought and found a new market for New River coal; and the said contract, which was in nowise hidden or concealed, but which was known to every coal dealer on the Atlantic Coast, was welcomed by the operators on the line of the Chesapeake & Ohio Railway Company as the dawn of a brighter era in the business of mining coal.

In speaking about this contract Mr. Justus Collins, one of the largest coal operators in the New River District and the President of the New River Coal Operators' Association, said:

> "At the time that the said original contract for the delivery of the 2,000,000 tons of coal to the New York, New Haven and Hartford Railroad Company was made, the said contract was regarded by the coal operators as a most favorable and beneficial one for the New River District, and it continued to be absolutely so for at least three years of its existence. The affiant further says that he is now and has been for the past fifteen years engaged in large coal operations on the line of the Norfolk & Western Railway Company, and that at the time the said contract was made and for a considerable period thereafter the coal sold on the line of the Norfolk & Western Railway Company of like character only netted the said operators on the said Norfolk & Western Railway the sum of 59c per gross ton, whereas under the terms of the contract for that furnished the New York, New Haven & Hartford Railroad Company the same netted the operators not less than 70c per gross ton throughout its life." (Record p. 136.)

Samuel Dixon, who is extensively engaged in mining and shipping coal on the line of the Chesapeake & Ohio Railway Company, said:

> "The affiant further says that he is thoroughly familiar with the conditions surrounding the coal trade in the New

River District, and also in the Kanawha District; that he has known of the contract between the Chesapeake & Ohio Railway Company and the New York, New Haven & Hartford Railroad Company for supplying 2,000,000 tons of coal at the rate of 400,000 tons per year ever since that contract was made; that he knows that at the time it was made it was a matter of common knowledge and considered an exceedingly beneficial contract to the operators of the New River District; that he knows that it continued to be an advantageous contract up to about the year 1900 when the price of labor advanced; that he knows that through and by means of said contract the coal operators in the New River District were enabled to get a better price for their coal than they would have gotten had the contract not been made." (Record pp. 131-2.)

All the testimony of the coal operators on the line of the C. & O. Ry. filed with the record is to the same effect.

President Ingalls speaking of this contract said:

"That in this whole matter he acted according to his judgment in the best interest of all concerned; that he regards the contract which the C. & O. Railway Company made through him with the N. Y., N. H. & H. R. R. Company, as having saved the C. & O. Railway Company a place in the market; having kept the mines along its lines going and the mine laborers employed therein at work and the said coal in the market; that said arrangement was of the greatest benefit not only to the C. & O. Railway Company, but to the community served by it known as the New River District. (Record p. 115.)

The Court could not but hold that this contract was made *uberrima fide*, and hence the learned judge in his able opinion said:

"In the case at bar I do not find anything which satisfies me that the C. & O. in making the contract of 1896 had any special design to give a rebate to the New Haven Company

or to any particular coal operators. In other words, I do not find here that the contract of 1896 was intended as a ruse or a device to evade the commerce act. The contract was made at a time of extreme financial depression. It appears to have been an entirely honest effort by Mr. Ingalls to find a market for coal produced on his line." (Record p. 220.)

And in exonerating the New Haven Company from the charge of having received a "rebate or concession" on the coal delivered to it the court said:

"I can find no evidence in the record which satisfies me that in making the contract of 1896 the C. & O. intended a ruse or device to give a rebate on freight rates to the New Haven Company." (Record p. 222.)

M. E. Ingalls was succeeded as President of the C. & O. Railway Company by George W. Stevens in February, 1900, and the new management continued to perform said contract which, about this time, became less profitable because of the advance in the cost of mining, producing a corresponding advance in the price of coal, and because of the failure of the Atlantic Tranportation Company to perform its contract for water transportation. (Affidavit of M. E. Ingalls—Record p. 115.)

The contract was substantially completed by July 1, 1902, and would have been fully completed but for the coal miners' strike which occurred *June 7, 1902,* which paralyzed the coal industry, enormously increased the price of coal, and caused practically an entire cessation of shipments on the line of the C. & O. Railway Company. When this untoward event occurred there remained undelivered under said contract only 59,966 tons. Subsequently, on January 12, 1903, the New Haven Railroad rendered a bill against the C. & O. Railway Company for $103,910.69 for the excess over contract price paid by the former Company for bituminous coal "purchased outside to make good shortage on contract." Of this bill the Court in its opinion said:

"This bill is alleged to be (and I find no evidence to the

contrary) the actual difference between the cost of the coal purchased by the New Haven Company from others and what would have been the cost of it had the C. & O. Railway Company fulfilled the contract of 1896. This demand, therefore, could not properly be considered an unadjusted or vague and unliquidated claim." (Record p. 217.)

The C. & O. Railway Company recognizing its obligation under its contract and desiring in good faith to discharge it, endeavored to induce the operators in the New River District, who theretofore had been furnishing the said Railway Company with the coal called for by its contract with the New Haven Company, to continue to supply the coal, but owing to the difficulties in producing coal incident to the coal miners' strike, and the enormously enhanced cost of production they were unwilling at that time to do so. (See affidavit of Samuel Dixon, Record p. 132 and affidavit of Justus Collins, Record p. 135.)

The President of the C. & O. Railway Company, being unable to procure the coal in the New River District, made a verbal arrangement with the President of the New Haven Company to deliver to said company the balance of 59,966 tons of *Kanawha coal* instead of New River coal, the New Haven Company consenting to accept the lower grade of coal and to release its claim for $103,910.69, which coal the C. & O. Railway Company arranged to get at the price of $1.28 per gross ton. (See affidavit of J. R. Thomas, Record p. 126.) Thereupon in the month of May, 1903 the C. & O. Railway Company commenced the delivery of Kanawha coal to the New Haven Company to complete the shortage under its contract of 59,966 tons, and by July 2, 1903, it had delivered 38,224 tons, leaving a balance of 21,742 tons to complete the tonnage called for by said contract. At this time (July 2, 1903) further shipments were suspended in consequence of a telegraphic summons from the Interstate Commerce Commission to the President of the C. & O. Railway Company to appear before that body in Washington to answer a charge that his company was discriminating in freight rates by

shipments of coal to the New Haven Company in May and June 1903. The President of the C. & O. Railway Company answered this summons by appearing in person before the Commission in Washington on July 3rd, at which time he ascertained that the summons had been issued on the complaint of W.C. Bullitt, who, on June 30, 1903, made the following affidavit, charging that the C. & O. Railway Company was engaged "in the carriage of freight traffic at less than its published rates on file, and was committing a discrimination forbidden by law:"

"City of Washington |
District of Columbia |

ss.

"This day personally appeared before the undersigned, Martin S. Decker, Notary Public for the City of Washington and District aforesaid, William C. Bullitt, and being by me duly sworn deposed and saith:

"First. That he is engaged in the businesss of selling coal and that his place of business is the Arcade Building, Philadelphia, Pennsylvania.

"Second. That he has been offered coal in the Kanawha District on the line of the Chesapeake & Ohio Railway Company in the State of West Virginia at a price which is very attractive to him, and which he wishes to purchase; and desiring to remove the same to Newport News for shipment beyond the capes of the Cheseapeake, he applied to the Chesapeake & Ohio Railway Company for a freight rate on coal from the said Kanawha District of West Virginia to Newport News, which said coal was to be shipped beyond the capes of the Chesapeake.

"To his application for rates, as aforesaid, the Chesapeake & Ohio Railway Company replied that the rate on coal from the Kanawha District to tidewater, for shipment beyond the capes, is one dollar and forty-five cents ($1.45) per ton, which freight rate has prevented complainant from purchasing the coal offered to him as aforesaid in the

Kanawha District of West Virginia, as under this rate he could not afford to move the same at present.

"Affiant further saith that he is informed and believes that during the spring of 1903 the Chesapeake & Ohio Railway Company made a contract to carry a large amount of coal to wit, sixty thousand (60,000) tons from the Kanawha District of West Virginia to tidewater, for shipment to New Haven, for the New York, New Haven & Hartford Railroad Company, from which said traffic the Chesapeake & Ohio Railway Company will realize for carrying the same from twenty ($.20) to sixty ($.60) cents per ton; at least affiant is informed and believes that the rate the Chesapeake & Ohio Railway Company will receive on this traffic is far below the published rate of $1.45 above set forth.

"Affiant further states that he is informed and believes that the Chesapeake & Ohio Railway Company is now engaged in carrying the sixty thousand (60,000) tons of coal aforesaid, and that out of that amount it has already carried and delivered at least twenty-five thousand (25,000) tons, at a rate far below its published rate aforesaid.

"Affiant further says that he is informed and believes that the Chesapeake & Ohio Railway Company undertakes to justify this course on the ground that in 1896 a contract was made by the Chesapeake & Ohio Railway Company with the New York, New Haven & Hartford Railroad Company by which the former sold and agreed to deliver to the latter two millions (2,000,000) of tons of best quality of coal on or before the 1st day of July, 1902, delivery to begin July 1st, 1897, and not to exceed four hundred thousand (400,000) tons per annum. The price to be paid by the New York, New Haven & Hartford Railroad Company to the Chesapeake & Ohio Railway Company for this coal was two dollars and seventy-five cents ($2.75) per ton on the New Haven basis.

"Affiant says that he is informed and believes that during

the life of this contract up to and including the month of June, 1902 (after which time deliveries ceased), the Chesapeake & Ohio Railway Company had failed to deliver about sixty thousand (60,000) tons of coal required by the contract aforesaid.

"Affiant further says that he is informed and believes that this contract was illegal and void and that the Chesapeake & Ohio Railway Company had no power to make such a contract; and affiant verily believes that the contract for this coal was at such a price that the freight rate thereon to be received by the Chesapeake & Ohio Railway Company was far below its published rates.

"Affiant further says that he is informed and believes that some months after the contract aforesaid had expired the New York, New Haven & Hartford Railroad Company rendered a bill to the Chesapeake and Ohio Railway Company for something over one hundred thousand ($100,000) dollars damages for failure to deliver the coal called for by the contract aforesaid; and during the winter of 1902-1903 the President of the Chesapeake & Ohio Railway Company arranged a new contract between the New York, New Haven & Hartford Railroad Company, through a coal broker, by name Wittenburg, and a coal operator in the Kanawha District, by the name of Thomas, by which it was agreed that Thomas should ship sixty thousand (60,000) tons of coal from the Kanawha District to the New York, New Haven & Hartford Railroad Company at $2.75 per ton, said coal to be delivered prior to July 31, 1903.

"Affiant further states that he is informed and believes that the cost of delivery of this coal per ton to New Haven, not including the freight rate to the Chesapeake & Ohio Railway Company from the Kanawha District to Newport News, is as follows:

By paid to Thomas, per ton	$1.28
Commission to broker	.05
Ocean rates	about 1.00
Discharging	19
Total	$2.52

"So that the Chesapeake & Ohio Raiway Company realizes from this traffic about twenty-three ($.23) cents per ton for carrying coal from the Kanawha District to Newport News for shipment beyond the capes of the Chesapeake and the published tariff of the Chesapeake & Ohio Railway Company for like coal from the same district to the same destination is one dollar and forty-five ($1.45) cents per ton.

"Affiant is informed and believes that the Chesapeake & Ohio Railway Company claims that by this arrangement it is paying off a claim against it asserted by the New York, New Haven & Hartford Railroad Company; but affiant is informed and believes that the said claim against the Chesapeake & Ohio Railway Company is not a valid, legal demand and that the delivery of this coal to the New York, New Haven & Hartford Railroad Company at the rate to be received by the Chesapeake & Ohio Railway Company is a discrimination against all the other coal produced in the Kanawha District, and prevents affiant from moving the coal in the Kanawha District which has been offered to him as aforesaid.

(Signed) WILLIAM C. BULLITT.

"Subscribed and sworn to before me this 30th day of June, 1903.

(Signed) MARTIN S. DECKER,

(L. S.) NOTARY PUBLIC.

Record pp. 8, 9, 10-11

Thereupon the Interstate Commerce Commission instituted this proceeding based on the foregoing affidavit.

It will be noted that this proceeding was set on foot more than six years after the contract with the New Haven Company was made, and at a time when a mere remnant of the immense tonnage called for by said contract remained undelivered. The affiant, the said W. C. Bullitt, is a member of the firm of Castner, Curran & Bullitt, coal brokers, whose operations are confined to the sale of "Pocahontas" coal produced on the line of the Norfolk & Western Railway, which is an entirely different grade of coal from that produced in the Kanawha District on the line of the C. & O. Railway. The said Bullitt was never interested in the purchase or sale or transportation of a ton of coal produced on the line of the C. & O. Railway. He was a coal broker, engaged in the sale of coal produced on another line, and as such, he had known of the contract now under consideration long before he set this proceeding on foot; that he was familiar with its exact terms is shown by the detailed statement in relation to it made in his affidavit. With the amplest knowledge of the nature and terms of the contract practically during its existence, the inquiry naturally suggests itself why he should have waited more than six years, and until the contract was substantially completed, to make complaint against it if he deemed it an improper contract for the C. & O. Railway Company to perform. In his affidavit he states that he had been "offered coal in the Kanawha District on the line of the C. & O. Railway Company in West Virginia at a price which was very attractive to him and which he wished to purchase . . . . :that he applied to the C. & O. Railway Company for a rate on coal from the Kanawha District to New Haven . . . . and to his application the Railway Company replied that its rate on said coal was $1.45 per ton, which rate prevented him from purchasing the coal offered him, as under said rate he could not afford to move the coal *at present.*" But he did not state how much coal had been offered him or by whom or at what price, or the rate which he applied for. The C. & O. Railway Company produced and filed in the record the affidavits of practically all the operators in the Kanawha and New River

Districts who produced or handled coal for tidewater shipments; and each one denied that the said Bullitt had ever applied to him to purchase Kanawha coal, or coal of any other grade on the line of the C. & O. Railway, or that he had, to their knowledge, ever been interested in the production or transportation of coal on the line of said railway. In response to these affidavits, and in explanation of his statement, the said Bullitt made another affidavit on the 13th day of November, 1903, and filed with the record (pp. 143-4), naming J. W. Hopkins, of Richmond, Virginia, as the person who had offered to sell him Kanawha coal not to exceed 1,000 tons per day "at a price which was satisfactory had he been able *to secure the reduction in freight rate* which he thereupon applied for to the C. & O. Railway Company." In this second affidavit he did not mention the "price" at which the coal was alleged to have been offered him or the "rate" for which he applied. J. W. Hopkins, in an affidavit dated November 27, 1903, and filed with the record (p. 172) denied that he had ever "offered to sell the said Bullitt such quantity of Kanawha coal as he might wish to buy not to exceed 1,000 tons per day or in any other quantity," or had ever been applied to by the said Bullitt for a quotation on Kanawha coal "for the purpose of making an actual purchase," and that "he had never sold Kanawha coal to the said Bullitt or his firm, or been asked for prices on said coal with the understanding that the said Bullitt contemplated becoming a purchaser." To this affidavit the said Bullitt, although he had the opportunity to further explain, made no response.

It will be observed that he did not claim that he was a *shipper* but that he *might have been* "if he had been able to secure the reduction in freight rate which he thereupon applied for." If his statement be accepted as true the fair inference from it is that if the C. & O. Railway Company had violated its published tariff and given him the "reduction in freight rate (whatever it was) for which he applied" he would have had no complaint to make against the New Haven contract, and this proceeding would not have been started. In other words, that his real griev-

ance was not that the C. & O. Railway Company was violating the law, but that it would not violate it for his benefit.

ARGUMENT.

The petition filed by the Interstate Commerce Commission alleged that in delivering the coal in May and June, 1903, to complete the tonnage called for by its contract with the New Haven Company the C. & O. Railway Company was engaged in "the carriage of freight traffic at less than its published rates on file and was committing discrimination forbidden by law." There was no complaint that the published rates were excessive or unreasonable, but the petition was based upon the alleged violation of the *2nd* and *6th sections* of the Interstate Commerce Law, which forbid a departure from the published freight rate, or the charging of one person a higher rate than another for transporting traffic of the same kind and under substantially similar circumstances. It is alleged that this discrimination is shown by the fact that the C. & O. Railway Company did not realize out of the price obtained for the coal delivered in May and June 1903, after payment of the cost of the same and the expense of transportation more than 23c per ton to represent the freight earned, whereas its published rate on file for the transportation of similar coal to tidewater was $1.45 per ton. The fact is that the C. & O. Railway Company not only realized 39 1-2c net for each ton of coal delivered in May and June 1903 over all cost and expense incident to its purchase and delivery, but also settled a liquidated claim against it amounting to $103,910.69, which amount should be taken into account in any just estimate of the consideration to be received on the one side and to be paid on the other for the coal furnished and to be furnished on account of the remnant due under its contract with the New Haven Road; but notwithstanding the fact that the charge of discrimination in freight rate set up in the petition is predicated solely on the

price of said coal, the petition takes no account of said claim as a part of the consideration.

But it is apparent that this matter did not involve a question of transportation or rates. The New Haven Company was not a shipper of coal and had no interest in the freight charges of the C. & O. Railway and could not be benefited or injured by the reduction or increase of such charges. The purpose of section II is to prevent unjust discrimination between shippers. (*Tex. and Pac. R. R. Company* v. *I. C. C.*, 162 U. S. p. 219.) There must be *competition between shippers* before there can be unjust discrimination. No such question is presented by this record. The New Haven Company made no contract for transportation, and the question of transportation as such is not involved in this case. The New Haven Road simply bought coal from the C. & O. Railway Company as it would have bought it from any other seller at a fixed price to be delivered in its bins on its line. The C. & O. Railway Company was the *vendor* of the coal as well as the *carrier*. The Interstate Commerce Act does not forbid a carrier to be interested in a commodity transported by it—nor does it undertake to regulate or prescribe prices at which articles shall be sold, in order to realize established freight rates thereon. A carrier may in good faith engage in transporting a commodity of which it is the owner, or in which it is interested, and if it sustains a loss on the transaction, such loss would be in its capacity as *dealer* and not as *carrier*. This question was considered by the Interstate Commerce Commission in the case of *Haddock* v. *Del. &c. R. R. Co.*, 4 I. C. C. Reports 266, and in the case of *Coxe Bros.* v. *the Lehigh &c R. R. Company*, 4 I. C. C. Reports 535. In the former case, decided in 1890, it was held that when the carrier is the owner of or interested in the commodity transported, the provision against unjust discrimination, etc., does not apply ; and that in such case the only question which could be inquired into was as to the *reasonableness of the published rate*. The Commission, speaking through Judge Cooley, its chairman, said:

> "The question, then, as between the complainant and the respondent in this case should rather be called a question of reasonable rates than a question of unjust discrimination, for the reason that as already shown, there is, from the very nature of the case and because of the situation—the respondent being both carrier and shipper—a situation that we must now assume we can in nowise change or alter, an absolute impossibility of applying any definite rule whereby unjust discrimination can be determined."

In the case of *Coxe Bros.* v. *Lehigh &c. R. R. Company*, decided in 1891, it appeared that the Railroad Company owned all the stock of the Lehigh Valley Coal Company (as the C. & O. Railway Company might do in respect to coal operations on its line—Act of Assembly of Virginia approved December 18, 1889—Record p. 112), which latter company shipped its output over the line of the Lehigh Valley Railroad, and complaint was made by a *shipper* of similar coal that the price obtained by the Lehigh Valley Railroad Company for the coal so transported, after deducting all expenses and costs of delivery, left a sum remaining considerably less than the regular rate which the said railroad company was charging for transporting similar traffic over its line for others. This charge was made by Coxe Bros. & Company, *shippers of similar coal* over the Lehigh Valley Railroad to the same destination, and their complaint was stated as follows:

> "That the said Lehigh Valley Railroad Company, either directly in its own name or indirectly in the name of the Lehigh Valley Coal Company aforesaid, is now, and has been for some time past, purchasing anthracite coal in the anthracite regions of Pennsylvania and transporting the same as interstate commerce to tidewater on the coast of New Jersey, over the same lines as those over which the complainants are shipping anthracite coal, and selling the said coal so purchased at tidewater at such prices, that, after deducting therefrom the price at which the said coal was purchased, and a reasonable and proper allowance for shipping

and selling expenses, there remains as the revenue or receipts for transporting a much less sum than that charged by the Lehigh Valley Railroad Company to the petitioners and public generally for a like and contemporaneous service in the transportation of anthracite coal transported under substantially similar circumstances and conditions."

The Interstate Commerce Cimmission, through its chairman, Judge Morrison, held that this was not a case in which the rule against unjust discrimination could be applied, and that the only question to be determined was whether the Lehigh Valley Railroad Company imposed on other shippers a *reasonable rate* as compared with the profit realized by it on coal shipped on its own account. The proposition is thus stated in the syllabus:

"A railroad company carrying coal as interstate traffic is the owner of the capital stock of a coal company, which under its charter holds lands, mines, buys and sells coal, and ships over the lines of said railway company. *Held,* where such conditions result in violations of the Act to regulate Commerce, the only regulation practicable is the enforcement of the provision of the Act requiring rates to be reasonable."

Judge Morrison, in the course of his opinion, said:

"The fact that the Railroad Company, directly as a carrier and indirectly as a coal company and an operator, so conducts the business of buying, shipping, carrying and selling coal that the road realized less for transportation than its established rates, affords evidence of the defendant's readiness to take the freight at less than full charge, and justifies the conclusion that the charges to others are to some extent excessive."

The foregoing cases are similar in their statement of facts to the case at bar. There the Railroad Company, as in this case, was both *vendor* and *carrier* of the coal, and the Interstate Commerce Commission, speaking through Judges Cooley and Morrison, arrived at the conclusion that the only question which

could be inquired into, under the Interstate Commerce Act, was as to the reasonableness of the published rate. The reasonableness of the published rate of the C. & O. Railway Company is not the subject of complaint in this case, and no inquiry was made concerning it.

The opinions of such eminent jurists as Judges Cooley and Morrison are entitled to the respectful consideration of any court.

The lower court in the course of a very able discussion of this question held that there had been no violation of sections II. and VI. of the Interstate Commerce Act; that any loss suffered by the C. & O. Railway Company under its contract with the New Haven Company should not be treated as a reduction in freight rates, and did not, therfore, constitute a violation of sections II. and VI. but should be treated as a loss sustained by the C. & O. Railway as a vendor of the article transported. The court in the course of its opinion said:

> "Can an interstate carrier buy and then sell articles, to be carried over its own line, at a price less than the aggregate of the cost and expense items and its own published freight rate? Always excepting cases where such dealings are mere devices to cover an intentional giving of a less rate for carriage to some than to others, it seems to me that this question must be answered in the affirmative in so far as the second section of the act applies. . . (Record p. 220.)
>
> "A statute which goes no further than to forbid carrying for one at less than the price charged others is not sufficient warrant for holding that a loss suffered by a carrier-vendor has to be considered as a loss on carriage. If there were a Federal statute forbidding a carrier to become a dealer or if there were a statute forbidding a carrier dealer to sell articles of transport at less than the aggregate of all cost items and its own published freight rate, or if there were a statute providing that in such cases all losses

must be treated as losses on carriers, the way would be clear. But, with the law as it is, in so far as the second section of the act goes, I fail to find authority for saying that loss under such a contract must necessarily be treated as a loss on carriage. Failing to find, so far, any law forbidding the carrier-dealer to suffer a loss as dealer, we are met always with the unanswerable proposition that the loss under such a contract can just as properly be treated as a loss suffered as dealer as it can as a loss on carriage. . . . (Record p. 221.)

"As before remarked, to say that the losses suffered by the C. & O. must be treated as a carriage at a too low rate is to assert that the honest losses of a vendor-carrier must be treated as reductions in freight rates, and can not be treated as dealer's losses. To so hold is to lose sight of the carrier's relation to the transaction as vendor. . . .

"Being unable, therefore, to find in the law anything which forbids a carrier to be a dealer in articles to be carried by it, and also being unable to find anything which forbids a dealer to suffer honest losses, I am unable to say that the transactions in question were in violation of the 2nd section of the act.

"No discussion of the 6th section of the act is necessary. If the transactions prior to 1903 did not violate the 2nd section, they did not violate the 6th section." (Record, pp. 222-3).

It was next asserted in the petition of the Interstate Commerce Commission that the New Haven contract was "illegal and void and that the C. & O. Railway Company had no power to make such a contract." This is equivalent to saying that if the C. & O. Railway Company possessed corporate power to make the contract, the acts complained of would not have been in violation of the Interstate Commerce law. The fact however that the Railroad Company had corporate power to make the contract would not make *lawful* what would be *unlawful* without such power. The contract

having been made in good faith the question whether or not it is *ultra vires* is not a question to be considered by the Interstate Commerce Commission, and cannot be raised collaterally or considered in this case. In the Coxe case already quoted from, Judge Morrison said:

> "The legal right of the Lehigh Valley Railroad Company to take and hold the capital stock of the Lehigh Valley Coal Company, and the right of said Coal Company to mine, buy, ship and sell coal is not raised in this proceeding, and if such right were raised and challenged, this commission would have no authority to determine it. . . . The authority of this Commission extends to such abuses only as are not in conflict with the act to regulate commerce or some of its provisions."

The lower court decided this question adversely to the contention of the Interstate Commerce Commission, saying in the course of its opinion:

> "But until some one having the right so to do has the contract of 1896 declared by a court of competent jurisdiction void on the ground of *ultra vires*, I do not perceive that we have here any right to consider the question (see 4 Thomp. Corp., 5638; 5 *ibid.*, sections 6030, 6032 6033, 6034.) For reasons of business policy, both the managers of the C. & O. and its stockholders, so far as here appears, prefer not to raise the question of *ultra vires*. The State of Virginia has not raised it, and no creditor has raised it. No Federal law has been contravened by this contract (in so far merely as it is *ultra vires*), and I do not perceive the right of the Interstate Commerce Commission to raise the question here." (See Record, pp. 217-8.)

The court having thus disposed of the case stated in the petition adverse to the contention of the Interstate Commerce Commission, nevertheless held that the contract of 1896, though valid when made, subsequently became invalid under SECTION III of the Commerce Act by reason of the fact that the contract,

because of the increased cost of delivering the coal, subsequently became unprofitable to the C. & O. Ry. and thereby resulted in an undue preference to the New Haven Company, and an undue prejudice to some party or parties unknown, and that the demand of said company in April, 1903, for $103,910.69 for damages for breach of said contract was, therefore, an illegal and unenforceable demand.

We submit that the conclusion of the court was not justified by the case stated or proved, as there was no allegation in the petition that this section had been violated, and no proof was introduced on that theory, nor was any fact alleged which, if proved, constituted an offence against said section. *Texas &c. R. R. Co.* v. *I. C. C.*, 162 U. S. 238.

The petition was based on the theory that sections II and VI had been violated. Section II as we have seen, relates solely to monies exacted unjustly from the *individual shipper* in excess of monies received from any other *shipper* for a like service, and section VI forbids a departure from the published freight rate. The Court held that neither of these sections had been violated. The protection afforded by section III relates to any unjust advantage, or preference, given to any *particular person*, or to a *locality*, or with regard to any particular *description of traffic*, or to any unjust *discrimination* by one *carrier against another carrier* as to rates, charges or facilities in operating connecting lines, or in making joint rates over connecting lines.

None of these offences is charged, or proved, nor was it contended that the New Haven Company received any preference such as is contemplated by this section.

In commenting on the third section the court said:

> "We are now, therefore, brought to consider if the transactions in question prior to 1903 either gave someone an undue advantage or caused someone an undue prejudice in any request whatsoever. . . . The third section is very comprehensive and broad. A prejudice to any one in any respect is forbidden." (Record p. 224.)

The reasoning of the court was to the effect that if other coal from the line of the C. & O. Railway Company went to New York or New England during the period covered by the New Haven contract prior to April, 1903, then the New Haven Company got its coal on better terms than some other consumer, and some one suffered a comparative prejudice—either a "New York or New England consumer," or else "some coal operator or some coal dealer or some water carrier." But the court said:

> "I cannot from the evidence say just who suffered this comparative prejudice, but it is sufficient if any one did." (Record p. 224.)

By parity of reasoning it may be said that if no one was prejudiced, there was no violation of the law. The decision of the court is based on the theory that "other coal was shipped over the line of the C. & O. Railway to New York or New England points during the period covered by the New Haven contract," from which the court concludes that some one must have been prejudiced. But no one has complained, and the court is unable to say who was prejudiced. Assuming that other coal was shipped to New York or New England points, it does not appear by whom or when it was so shipped, or to what points or to whom, or what price was paid for the coal at the mines, or what price was realized from the sale of it.

The Interstate Commerce Law is not a system of hard and fast rules to be applied without proof; before a party can be convicted of an offence under the law, and be subjected to its pains and penalties, the offence must be specifically charged and clearly proved.

The Court being unable to say from the evidence just who, if any one, suffered "a comparative prejudice," we submit that there was no basis for its conclusion that the law was violated.

In a supplemental opinion the court held that the contract of 1896 resulted in a violation of that provision of the third section, which forbid any undue or unreasonable prejudice to any "particular description of traffic." On this point the court said:

"The third section of the Commerce Act forbids that any 'particular description of traffic' be subjected to an undue or unreasonable prejudice or disadvantage. Traffic can be subjected to a disadvantage only when some or all of the persons concerned with such traffic are subjected to disadvantage. If either the producers of, or the water carriers of, or the consumers of the Kanawha coal which went to New York or New England for others than the New Haven Company, suffered a disadvantage, then this traffic suffered such disadvantage. I am inclined to think that the use of the expression 'any particular description of traffic' is sufficient to show that it is not necessary for the complainant either to allege the names of the persons thus prejudiced, or to prove who the particular persons are. Having found that some or all of the persons concerned with the Kanawha coal destined for points 'beyond the Capes' other than that for the New Haven Company, were subjected to an undue disadvantage, it follows that I have found that this particular traffic has been subjected to such disadvantage." (Record pp. 230-31.)

The conclusion of the court that a "particular kind of traffic" had suffered disadvantage is based upon a finding of fact that "some person or persons" had been prejudiced. But this finding of fact, which is wholly indefinite as to persons, and time, place, character, extent and manner of the supposed prejudice, is qualified by the statement of the court that it is "unable to say who suffered" the supposed disadvantage. A finding involving penal liabilty should be supported by clear and specific proof, and the court could not be in doubt as to facts essential to constitute the offence if its finding of fact were based on sufficient evidence. If the finding of fact was not supported by sufficient evidence the conclusion based on it falls with it.

But even if the finding of fact be accepted as correct, the conclusion would not follow that there had been discrimination against any "particular kind of traffic." Unjust discrimination

between *shippers* engaged in the *same kind of traffic* is a discrimination against the *individual*, and not against the traffic in which he is engaged. Discrimination against an *individual* and discrimination against any *particular kind of traffic* are separate offences. In order that there may be discrimination in regard to any "particular description of traffic," it must appear that some *other description of traffic* is unduly favored in respect to freight rates, or facilities furnished for its movement. It is not even suggested that any other description of traffic over the line of the C. & O. Railway Company enjoyed any facility or advantage over the coal traffic carried on over said line; nor does it appear in this case that the C. & O. Railway Company was engaged in carrying any other kind of traffic than coal.

In holding that the New Haven contract of 1896 subsequently became invalid under Section III because of a change in conditions affecting the price of coal, the court said:

> "I am fully convinced that if a carrier-vendor makes a contract such as we have here under consideration at a time when the contract price will pay, or will practically pay, all cost items and the published freight rate of the carrier, such contract does not become illegal, if for reasons beyond the carrier's control the cost items rise somewhat, if not too much above the prices prevailing when the contract was made. But the very gist of the case lies in the amount of this increase in the cost items. . . .
>
> "While a carrier may become a dealer in articles of transport, and can sell (and consequently can contract to sell) such articles at a price which pays, or practically pays the cost items and its own published freight charges, yet, whenever the cost items so substantially rise that the loss to the carrier (as dealer) and the subsequent advantage to the purchaser-consignee, or to the disadvantage to someone else becomes unreasonable or undue, such sales become (or such contract becomes) illegal. When such a state of facts comes to exist the carrier must plead the illegality of such contract and cease to perform it. . . .

"The conclusion I have reached gives a carrier a right to cease to perform contracts made in good faith whenever the cost of the article or the other cost items go to such a point that the contract price does not equal (or practically equal) the cost items and the carrier's published freight rates." (Record pp. 225-6.)

Nothing could be more contradictory of the views customarily held than the conclusion of the Court as here announced, which is to the effect that one of the parties to a valid contract has the right to 'cease to perform' it, when it finds itself on the losing side.

We submit that if the contract was valid in its inception, as the court holds it to be, it could not become invalid by reason of the fact that *conditions* subsequently made the contract less profitable than when it was made. The rule is that a contract valid in its inception continues valid, even as against subsequent *legislation*. The legislature itself cannot impair the obligation of a contract, though it may declare that similar contracts shall be invalid. The only exception to this rule relates to a contract made with reference to a matter which is a subject of *state or national legislation and control;* such a contract may become invalid if it conflicts with *legislation* subsequently enacted regulating the subject of the contract. But in this case the contract is adjudged to be invalid not because it was in conflict with the *Interstate Commerce Act when made*, and not because it conflicts with subsequent *legislation*, but because *conditions* beyond the ken or control of the parties to the contract subsequently intervened which diminished the profits derived from the same by the C. & O. Railway Company.

The cases cited by the court in support of this conclusion are not analogous to the case at bar. They were cases wherein the contracts were held to be invalid *in their inception*, or where, relating to a matter subject to legislative control, they conflicted with *legislation subsequently enacted* regulating the subject of said contracts, or where there was a conflict between a state statute and the national law operating on the same subject matter,

in which latter case the state statute had to yield. But no case has been cited and we are not aware of any which holds that a contract, valid when made, can be rendered invalid by a change of *circumstances or conditions affecting its results.*

If the conclusion of the court be sound, it is equivalent to a denial of the right to a railroad company to be the carrier of coal or any other traffic as interstate commerce of which it is the owner, as no one would be willing to enter upon a contract which depended for its stability upon such an uncertain element as the cost of labor or other circumstances which might affect the result of said contract.

We respectfully submit that the court erred in holding the contract of 1896 void under the third section of the Interstate Commerce Act.

DECREE OF THE COURT.

The lower court, for the reasons heretofore stated, having found the contract of 1896 obnoxious to the third section of the Commerce Act, the Interstate Commerce Commission strenuously contended for an "omnibus" injunction requiring the C. & O. Ry. to observe its published tariffs "in respect to all carriage for all persons," and not to give to the New Haven Company "or to any other person, firm or corporation any undue or unreasonable preference or advantage," but the court refused to enter such an order, and entered an order to enjoin the C. & O. Railway Company from further carrying out the specific transaction against which complaint was made, and which had been adjudged illegal. Thereupon the Interstate Commerce Commission made a motion to enlarge this order in the manner contended for by it, and after full argument this motion was overruled. This action of the court in refusing to grant an "omnibus" injunction is the ground upon which the Interstate Commerce Commission is prosecuting this appeal. The scope of the injunction contended for by the Interstate Commerce Commission is thus set forth in its first assignment of error:

"That the said court merely enjoined and restrained the C. & O. Ry. Co., its officers, agents, and employes from, in any manner, direct or indirect, executing or performing or attempting to execute or perform either said contract of December 3, 1896, or said agreement of April, 1903, and from in any manner discharging or satisfying any obligation or seeming obligation arising from said agreements or either of them, or arising from any arrangement or agreement made in lieu of said agreements or either of them; whereas said court should have further enjoined and restrained the C. & O. Ry. Co. from giving to said railroad company, *or to any other person, firm or company,* any undue or unreasonable advantage or preference, and should further have restrained and enjoined the C. & O. Ry. Co. from transporting coal from one state to or through any other state, for the New York, New Haven & Hartford Railroad company, *or for any firm, person or company,* at a less rate than the duly established freight rate of the said railway company in force at the time, and *from further failing to observe its published tariffs,* or from giving to the said N. Y., N. H. & H. R. R. Co., *or to any person, firm or company, in any manner whatsoever, any undue or unreasonable preference or advantage,* and said decree entered by the court, on the 19th day of February, 1904, in addition to the provisions thereof, should have enjoined and restrained the N. Y., N. H. & H. R. R. Co. and its officers and agents from seeking or accepting in any manner any direct or indirect rebate of the duly established freight rates of the C. & O. Ry. Co. on any interstate commerce and from seeking or accepting in any manner from said railway company any undue or unreasonable preference or advantage." (Record, pp. 241-2.)

The following extracts from a written argument filed by counsel for the complainant in the court below will show the grounds on which the Interstate Commerce Commission based its contention for this injunction.

"The defendants, the Railway Company and the Railroad Company, are shown to have been *violators of the law,* and the purpose of the injunction is to *compel obedience to the law as contained in the Act to regulate commerce,* and the Acts amendatory and supplementary thereto. The particular violation shown only indicates the attitude of the defendants towards the enactment of Congress.

"The defendants are not being tried for the commission of specific offences, but they are brought before the Court in a special proceeding for the purpose of being required to *observe their statutory obligations,* and if disregard of their legal duties is shown, then we urge that the court has ample authority, and should by injunction prohibit them from doing not only what they are shown to have done, but all acts of a kindred nature in violation of the Act to regulate commerce.

"The temporary injunction in this case was clearly granted upon the view that the carriers were *violators of the law,* as indicated by specific acts appearing in the record, and that they should be restrained from violating the law not only in the specific instances mentioned, but as to all interstate traffic they may carry or be interested in, respectively. And the permanent injunction should cover the same ground.

"The remedy by injunction, which is now expressly provided by the statute, is designed to prevent wrongs of this character, and plainly the theory upon which it is based is that upon showing the course or practice of violating the law in respect to the observance of tariff rates, or discrimination, that the whole course or practice, no matter to what specific articles it may have been applied, should be discontinued."

The gist of the argument seems to be that a single transgression of the Interstate Commerce Law shows "a course or practice of violating the law" and should therefore be punished by putting the offender under a general injunction not to violate the

law. According to this argument, if the defendant Railway Companies failed in a single instance (however innocently) to *"observe their statutory obligations"* the law requires them to be put under a general injunction to observe *all* of their "statutory obligations"—or, in other words, that they must thereafter conduct their business at the peril of a summons for contempt.

POWER OF THE COURT TO ENTER A GENERAL INJUNCTION.

It is not competent for the court to enter a general order commanding a defendant not to violate the Interstate Commerce Law; in such an injunction the court can simply *declare the law,* but has not before it any *specific* case to be adjudicated. It is fundamental that the defendant must be specifically informed as to what he is restrained from doing, and the court could not do more lawfully than enjoin the defendants from executing the specific act complained of.

BILL MUST BE SPECIFIC.

"In a suit for injunction the pleader must allege the facts entitling him to an injunction with precision and certainty, so as to distinctly inform the defendant of the nature of the case which he is called upon to meet, and if the bill contains only vague and indefinite allegations a demurrer will be sustained." (Ency. Pl. & Pr., Vol. 10, p. 923 and cases cited.)

"On an application for an injunction the facts relied upon must be clearly and positively alleged, and may not be inferred from the facts stated." (22 Minn. p. 437.)

ORDER MUST BE SPECIFIC.

"An injunction order should show upon its face all those things which it is necessary for the defendant to know in order to obey it, and should plainly indicate to the defendant specifically all the acts which he is thereby

restrained from doing without calling upon him for inferences, or any conclusions only to be arrived at by a more or less uncertain process of reasoning, and about which the parties might well differ in opinion, either as to the facts or law. The act prohibited must be the doing of some tangible or distinct thing or series of things to be clearly pointed out and described." (*Lyon* v. *Blotchford*, (N. Y.) 25 Hun. 57.)

"As the defendant is bound to obey the process of the court at his peril, the language of the injunction should in all cases be so clear and explicit that an unlearned man can understand its meaning, without the necessity of employing counsel to advise him what he has a right to do to save him from subjecting himself to punishment for a breach of the injunction." (*Laurie* v. *Laurie* (N. Y.) 9th Paige's Chancery Report, 234.)

"The writ of injunction should contain a description of the particular things or acts concerning which the defendant is enjoined in order that there may be no opportunity for misapprehension. No particular form, however, is required, and the writ will, of course, be varied to meet the peculiar circumstances of each particular case. It is sufficient that it be an authentic notification to the defendant of the mandate of the court, which he must then obey at his peril." (High on Inj., 2 Edition, Vol. 1, p. 30.)

"The injunction should in itself contain sufficient to apprise the party upon whom it is served what he is restrained from doing; without the necessity of resorting to the complainant's bill to ascertain what the injunction means . . . When an injunction has been granted by the proper officer, acting within his powers and jurisdiction under the rules of the Court, the defendant upon whom the same is served must not be permitted to speculate upon what may be the decision of the Court upon the equity of the bill upon which the injunction has been allowed."

(*Sullivan* v. *Judah*, 4 Paige's Chancery Reports (N. Y.), p. 444.)

"The injunction is not definite . . . The writ of injunction ought to be sufficiently explicit upon its face, by defining the property or matter enjoined, so that a party may thereby be clearly advertised of what he is to do." (*Moat* v. *Holbein*, 2d Edward's Chancery Reports (N. Y.), p. 188.)

"The person enjoined is entitled to know with reasonable certainty what acts he may or may not do without making himself liable as in contempt of an order." *Robinson* v. *Clapp* (Conn.) 29 L. R. A., 592.)

"The writ as a general rule, ought to contain a concise description of the particular acts or things in respect to which the party is enjoined, so that there may be no misapprehension on the subject." (*Whipple* v. *Hutchinson*, 4 Blatchford, 190.)

"This rule was expressed in the above case by Justice Nelson. This rule is approved in High on Injunctions (1st Edition) page 26, section 38. In reason it ought not to be left to a defendant to ascertain from what acts he is enjoined." (*St. Louis Min. and Mill Company* v. *Montana Min. Company*, 58 Fed. Rep., p. 129.)

"In *So. Ry. Co.* v. *Mechanics Local Union*, 111 Fed. Rep., page 58, Judge Hammond refused a general 'sweeping injunction' and held that 'the relief sought should be from the commission of specific acts charged in the bill.'"

From the foregoing it will appear that before the Court will exercise the power of injunction, the bill must specifically allege the thing or act to be restrained, and the order must clearly and definitely put the defendant on notice of what he "may or may not do without making himself liable as in contempt of the order."

Injunctions are granted upon a showing that in a particular case a wrong has been done or is threatened, and the doing of the particular wrong is enjoined. The allegations of the bill must be clear and definite in support of the right asserted, and

the order must plainly specify what the defendant is restrained from doing.

Would it be competent in this case for the Court to enter an injunction upon the general allegation that the defendant was violating the Interstate Commerce Law? Unless some specific act is alleged which constitutes that violation, the Court could not interpose, and if such act is alleged, it can only interpose to prevent it from being done. If the Court can enter in this case a general injunction against any and all future violations of the law, then why should it wait for its violation by any other railroad? It might as well issue a writ convening all the railroad companies within its jurisdiction and put them under a general injunction to obey at their peril every part of the act under penalty of contempt proceedings.

A general injunction could not be justified on the ground that the defendants in this case are conspirators, or persistent law-breakers; they have been absolved by the Court from all intention of wrongdoing; the single isolated transaction called in question has been held by the Court to constitute a violation of the Interstate Commerce Law because of commercial conditions which the defendants could neither foresee nor control. But it is said this "*particular* violation only indicates the *attitude* of the defendant towards the enactment of Congress;" that it shows a "*course or practice* of violating the law." How, it might be asked, can a "course or practice" be shown by a single act? This argument, moreover, is not supported by a scintilla of evidence, or even by an averment. The petition does not contain a single averment of an intent or threat on the part of the C. & O. Railway to violate the law, or that it had at any other time or in any other manner violated it; and no testimony was introduced on that subject. Yet it is gravely asserted that the defendant company had been convicted of a "course or practice of violating the law."

The "attitude" of the C. & O. Railway Company to the "enactment of Congress" is shown in the following extract from

the testimony of President Stevens before the Interstate Commerce Commission on July 3, 1903:

> "There is no company that is doing business that has been a more faithful adherent to its published tariff rates since February, 1900, than the Chesapeake & Ohio, and there has not been one rate made that has not been published with you gentlemen and adhered to; and if we made a reduced rate, we gave you the proper notice. I will challenge anybody to prove that we have made a rate in the last three years that we did not publish with the Commission and did not adhere to." (Record p. 27.)

That challenge was made on the very threshold of this proceeding. It was not accepted. The petition which was prepared and filed subsequently was silent on the subject, and no attempt even was made to controvert that statement by evidence. If it had not been *literally true,* it would have been easy to expose its falsity.

The general injunction proposed is as broad as the mandate of the law itself. If the defendant was charged with violating the law, however, it would be entitled to certain constitutional guarantees, such as presentation and trial by jury, whereas, if it was charged with violating the general mandate of this Court, its violation is tried in a summary way without the right of trial by jury, and punishment, involving fine and imprisonment, in addition to that prescribed by the Interstate Commerce Law, would be inflicted.

Section 2 of article 3 of the Federal Constitution provides that "the trial of all crimes except in cases of impeachment shall be by jury."

Would it not be an invasion of this constitutional right for the Court or the legislature to put a defendant under a general injunction not to violate the law, and thus by merely changing the name or nature of the proceedings, take away this guarantee? Yet, if the Court is authorized to issue a general injunction, it would merely substitute its general order for the mandate of the

law; such an order would not give any additional force or sanction to the statute; it would simply leave all alleged violations of the law to be tried in contempt proceedings without a jury, and subject the defendant to such punishment, either fine or imprisonment, as the Court might choose to inflict. Such punishment would, of course, not relieve the party of subsequent fine or punishment if indicted under the statute.

In *So. Pac. Co.* v. *Col. Fuel & Iron Co.*, 101 Fed. Rep. 779, C. C. A. Reports, Vol. 42, page 12, the Circuit Court of Appeals held:

> "That a restraining order that neither forbids or commands the doing of any specific act, but simply repeats the general admonitions of the Interstate Commerce Act, should not be granted since such an injunction does not give any additional sanction to the statute, but leaves all vital questions concerning violations of the law to be tried by proceedings for contempt, instead of being tried in the usual manner before a court and jury."

A general injunction would impose on the officers of the C. & O. Railway Company the duty of deciding nice questions of law, and of speculating on the opinion of the court in respect to questions about which lawyers and judges might well differ and impose on them the risk of punishment according to the view which the court might entertain. To extend this injunction so as to embrace any violation of the Interstate Commerce Law would justify the grant of an injunction restraining the doing of any act made criminal by statute. It would put upon the officers of the Railway Company the risk of having to decide what the Interstate Commerce Law means, under pain of fine or imprisonment in contempt proceedings according as the court might view the act in question.

In the course of the argument in the court below it was urged that the C. & O. Railway Company "ought not to object to obeying the law." If the Railway Company should be charged with disobeying the law why should it be tried on such a charge in a

summary way by the court without a jury and without regard to constitutional guarantees? If it is charged with a violation of the law why should it not be tried on such charge in the same way as any other person charged with a crime or misdemeanor? The Railway Company does not object to obeying the law, but it does object to being required to conduct its business under the surveillance of the court, and at the risk of arbitrary punishment in contempt proceedings for alleged violations of the law.

The Elkins Act furnishes no authority for such an order. Prior to that Act the general view was that the court had no power to enjoin except to compel obedience to on order of the Commission. The principal object of that Act was to give the Court in the first instance jurisdiction to enjoin any act, which the carrier was engaged in doing, and which constituted a violation of the law. Congress never intended to overturn the established rules of equity jurisprudence, nor did it intend to substitute the remedy by injunction for all other remedies prescribed in the Act to regulate commerce. The Court might just as well operate railroad properties through a receiver as under a general injunction "to obey the Interstate Commerce Law;" its supervision would not be more complete in the former case than in the latter.

Much reliance was placed by counsel for the Interstate Commerce Commission, in support of their contention for a general injunction, upon the case of *United States* v. *Michigan Central Railroad and others*, 122 Fed., p. 544. That case has no bearing upon the question at issue in this case. In that case the bill charged that the defendant had entered into a conspiracy and combination "to create a monopoly in the transportation of packing house products and dressed meats and grain," and similar proceedings were had against thirteen other railroads. No question in relation to a "combination or conspiracy" is involved in the case at bar. A temporary injunction was entered in the Michigan Central case which we understand was entered in the first instance by consent of counsel. The question at issue was

decided on demurrer, and the only order that was entered was the one overruling the demurrer filed. Whether there should be a permanent injunction, and if so, what its form should be, was never determined so far as we are advised.

Further reliance was placed by counsel for the Interstate Commerce Commission on the *Debs case,* 158 U. S. 583. This case involved the power of the court to issue an injunction against strikers who obstructed the operation of trains over highways of commerce, and interferred with the carrying of mail. The business of the government was forcibly interferred with. The jurisdiction of the court was sustained and an injunction entered against the commission of the specific acts charged in the bill. The decision in that case was placed on two distinct grounds: first, that the United States had a property in the mails, the protection of which was one of the purposes of the bill; and, second, that every government had a right to appeal to its own courts for any proper assistance in the exercise and discharge of the powers and duties entrusted to it for the general welfare. The court said: "The bill filed in this case alleged special facts calling for the exercise of *all* the powers of the Court. If ever there was a special exigency, one which demanded that the court should *do all that courts can do,* it was disclosed by this bill, and we need not turn to the public history of the day which only reaffirms with clearest emphasis all its allegations."

An extraordinary remedy was evoked in this case because the occasion was extraordinary, and the decision furnishes no authority for the proposition contended for by the Interstate Commerce Commission in the case before the court.

A recent decision of this court (*Swift etc.* v. *U. S.,* decided January 30, 1905) is decisive of the question involved in this case. That case involved the power of the court to enter *a sweeping injunction to obey the law,* and this power was denied. The court said:

> "On the other hand, we equally are bound by the first principles of justice not to sanction a decree so vague as to put the whole conduct of the defendant's business at the

peril of a summons for contempt. We cannot issue a general injunction against all possible breaches of the law. . . . The defendants ought to be informed as accurately as the case permits what they are forbidden to do."

The court modified the decree of the lower court so as to "restrain such combinations only to the extent of *certain specified devices* which the defendants are alleged *to have used and intend to continue to use.*"

It is submitted that the action of the lower court in refusing to enlarge the injunction in accordance with the contention of the Interstate Commerce Commission was correct.

RANDOLPH HARRISON
and A. R. LONG,
For Ches. & Ohio Ry. Co.

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Clerk.

In the Supreme Court of the United States.

OCTOBER TERM, 1905.

THE NEW YORK, NEW HAVEN AND HARTFORD Railroad Company, appellant,
v.
THE INTERSTATE COMMERCE COMMISSION.
No. 24.

THE INTERSTATE COMMERCE COMMISSION, appellant,
v.
THE CHESAPEAKE AND OHIO RAILWAY Company and The New York, New Haven and Hartford Railroad Company.
No. 27.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF VIRGINIA.

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION.

W. A. DAY, *of Counsel.*

In the Supreme Court of the United States.

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APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF VIRGINIA.

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION.

STATEMENT OF THE CASE.

These are cross appeals from a decree entered by the Circuit Court of the United States for the Western District of Virginia upon a petition exhibited by the Interstate Commerce Commission under the provisions of section 3 of an act entitled "An act to further regu-

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late commerce with foreign nations and among the States" (32 Stats., 847), which section reads as follows:

> SEC. 3. That whenever the Interstate Commerce Commission shall have reasonable ground for belief that any common carrier is engaged in the carriage of passengers or freight traffic between given points at less than the published rates on file, or is committing any discriminations forbidden by law, a petition may be presented alleging such facts to the Circuit Court of the United States sitting in equity having jurisdiction; and when the act complained of is alleged to have been committed or as being committed in part in more than one judicial district or State, it may be dealt with, inquired of, tried, and determined in either such judicial district or State, whereupon it shall be the duty of the court summarily to inquire into the circumstances, upon such notice and in such manner as the court shall direct and without the formal pleadings and proceedings applicable to ordinary suits in equity, and to make such other persons or corporations parties thereto as the court may deem necessary, and upon being satisfied of the truth of the allegations of said petition said court shall enforce an observance of the published tariffs or direct and require a discontinuance of such discrimination by proper orders, writs, and process, which said orders, writs, and process may be enforceable as well against the parties interested in the traffic as against the carrier, subject to the right of appeal as now provided by law. It shall be the duty

of the several district attorneys of the United States, whenever the Attorney-General shall direct, either of his own motion or upon the request of the Interstate Commerce Commission, to institute and prosecute such proceedings, and the proceedings provided for by this act shall not preclude the bringing of suit for the recovery of damages by any party injured, or any other action provided by said act approved February fourth, eighteen hundred and eighty-seven, entitled "An act to regulate commerce and the acts amendatory thereof."

* * *

The material facts of the case, as the record discloses them, are as follows:

On December 3, 1896, the Chesapeake and Ohio Railway Company and the New York, New Haven and Hartford Railroad Company entered into a contract of the following tenor:

> Contract made between the Chesapeake and Ohio Railway Company and the New York, New Haven and Hartford Railroad Company.
>
> Said Chesapeake and Ohio Railway Company, for the consideration hereinafter mentioned, hereby agrees to furnish to said railroad company not to exceed two million gross tons of bituminous coal from its line in such quantities monthly as wanted from July 1, 1897, to July 1, 1902, without charge for demurrage. Deliveries to be made not exceeding four hundred thousand tons per annum.
>
> And said Chesapeake and Ohio Railway Company further agrees that all said bitumi-

nous coal shall be of the best quality, first-class in every respect, and satisfactory to said railroad company, and said railway company has the right to terminate this contract at any time if said bituminous coal be of poor quality or if its delivery be unnecessarily delayed.

And said Chesapeake and Ohio Railway Company further agrees to deliver all said bituminous coal to said railroad company in its bins at such ports upon its lines as required by the monthly requisitions of its purchasing agent.

In consideration of the faithful performance by the said Chesapeake and Ohio Railway Company of all its agreements herein contained, said railroad company agrees to pay for said bituminous coal at the rate of two and seventy-five one-hundredths dollars per gross ton, New Haven basis, settlement to be made *monthly*.

Said railway company has the right to cancel any and all portions of said quantity of bituminous coal remaining undelivered on July 1, 1902.

Witness the names of the parties hereto this the 3d day of December, 1896.

CHESAPEAKE AND OHIO RAILWAY COMPANY,

By M. E. INGALLS, *President.*

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

By C. E. MELLEN, *Second Vice-President.*

For value received, I hereby guarantee that the Chesapeake and Ohio Railway Company shall not fail to deliver coal on account of strikes.

J. PIERPONT MORGAN.

The price of $2.75 a ton for deliveries at New Haven, as stated in the contract, was, it will be observed, the basis price, the price for deliveries at other New England points varying presumably as the distance varied. In the following statement and argument I shall use the average price, which is a few cents greater than the New Haven price, and therefore more favorable to the case of the defendants.

From July 1, 1897, to July 1, 1902, the period during which deliveries under the foregoing contract were agreed to be made, the Chesapeake and Ohio Company delivered to the New York, New Haven and Hartford Company, at New Haven and other New England points, all of the 2,000,000 tons of coal called for by its contract except 59,966 tons, which it was unable to deliver on account of strikes. The coal delivered under this contract was purchased by the Chesapeake and Ohio Company from operators along its line in the "New River District" of the West Virginia coal fields, and was shipped from there over the line of the Chesapeake and Ohio Company to Newport News, Va., and thence by water to New England points. At the time the purchases were made by the Chesapeake and Ohio Company there was upon the statute books of West Virginia an act passed February 15, 1895, making it unlawful and a misdemeanor "for any railroad corporation to engage directly or indirectly in the business of buying and selling coal or coke." (Record, p. 169.)

During the aforementioned period from July 1, 1897, to July 1, 1902, the Chesapeake and Ohio Com-

pany's rates per ton from the New River district in West Virginia to Newport News on coal destined beyond the Capes were as follows:

There was some contention as to what the rates were from July 1, 1897, to March 8, 1899. The Interstate Commerce Commission contended that the Chesapeake and Ohio Company then had no tariff applicable especially to coal shipped over its line to Newport News, to be thence shipped to New England points, and that therefore during that period it should have charged its local rates on coal hauled from the New River district to Newport News, namely, $2 a ton from July 1, 1897, to January 2, 1899, and $1.55 a ton from January 2, 1899, to March 8, 1899. The Chesapeake and Ohio Company claimed, on the other hand, that during that period its published tariffs of through rates on coal from the New River district to New York were in practice applied to coal destined to New England points, and were therefore the lawful tariffs on coal consigned to those points; and as that view may be accepted without prejudice to the Government's case I shall do so to avoid needlessly multiplying issues. The through rates to New York for the period in question were as follows: July 1, 1897, to January 2, 1899, $2.25; for January 2, 1899, $2; January 3, 1899, to March 8, 1899, $1.75. Three items made up the through rate: (1) The Chesapeake and Ohio Company's charge for transporting the coal from the New River district in West Virginia to Newport News, Va.; (2) the cost of the ocean trans-

portation from Newport News to New England, and (3) the cost of discharging. Therefore the amount which the Chesapeake and Ohio Company should have collected (or charged itself whenever it became a shipper) as its share of the through rate may be found by subtracting from the through rate the sum of items (2) and (3), which I have done in the subjoined table numbered one, in which (as well as in tables to follow), to insure accuracy, the computation has been made for each month of the period, as the cost of the ocean transportation and of the discharging varied from time to time.

TABLE I.

Showing Chesapeake and Ohio Company's published rates per ton from July 1, 1897, to March 8, 1899, on coal transported from the New River district to Newport News:

Period.		Through rate to New England points.	Average cost of ocean transportation.	Average cost of discharging.	Chesapeake and Ohio's rate, New River district to Newport News.
Year.	Month.				
1897	July	$2.25	$0.651	$0.226	$1.373
	August	2.25	.637	.223	1.390
	September	2.25	.666	.222	1.362
	October	2.25	.657	.224	1.369
	November	2.25	.658	.221	1.371
	December	2.25	.675	.228	1.347
1898	January	2.25	.699	.226	1.325
	February	2.25	.664	.229	1.357
	March	2.25	.709	.218	1.323
	April	2.25	.619	.226	1.405
	May	2.25	.649	.228	1.373
	June	2.25	.650	.223	1.377
	July	2.25	.561	.221	1.468
	August	2.25	.549	.220	1.481
	September	2.25	.582	.219	1.449
	October	2.25	.522	.231	1.497
	November	2.25	.553	219	1.478
	December	2.25	.932	.224	1.094
1899	January	1.75	1.061	.221	.468
	February	1.75	1.237	.212	.301
	March	[a]1.75	1.036	.324	.390

[a] To March 8.

From March 8, 1899, to July 1, 1902, the rates, as shown by the Chesapeake and Ohio Company's published tariffs (Record, pp. 87–101), were as follows:

TABLE II.

Showing published rates of Chesapeake and Ohio Company from March 8, 1899, to July 1, 1902, on coal transported from the New River district to Newport News.

Period.	Rate per ton.
March 8, 1899, to May 13, 1899	$0.90
May 13, 1899, to January 17, 1900	.80
January 17, 1900, to February 1, 1900	.85
February 1, 1900, to April 2, 1900	1.00
April 2, 1900, to April 1, 1901	1.15
April 1, 1901, to July 1, 1902	1.25

The final cost of the coal laid down at New England points was made up of four items: (1) The cost of the coal at the mines; (2) cost of ocean transportation from Newport News to New England points; (3) the cost of discharging the cargo at the end of the voyage; and (4) the cost of the rail transportation from the New River district to Newport News. Now, subtracting the sum of items 1, 2, and 3, as furnished by the Chesapeake and Ohio Company itself, from the contract price received by that company from the New York, New Haven and Hartford Company, it will be found that the amount left was, from the first delivery under the contract of December 3, 1896, in July, 1897, to the last, in June, 1902, except during nine months of the year 1899, inadequate by from $0.079 to $0.668 a ton, and by upward of $300,000 in the aggregate, to pay the Chesapeake and Ohio Company its published tariff rates, shown in Tables I and II (*supra*), for transporting the coal from the coal fields in West

Virginia to Newport News. Stated in another way, if, in making deliveries to the New York, New Haven and Hartford Company under the contract of December 3, 1896, the Chesapeake and Ohio Company had charged itself its published rates on the haul from the West Virginia coal fields to Newport News it would, from the first delivery to the last, barring nine months in 1899, have sustained a loss in the transaction amounting altogether to $300,000 in round numbers. These results are shown in detail, month by month, in the subjoined table.

TABLE III.

Period.		Amount delivered.		Average contract price per ton received from New York, New Haven and Hartford Company.	Outlay per ton required to deliver coal at New England points excluding tariff of Chesapeake and Ohio Company.			Amount left to pay published tariff of Chesapeake and Ohio.	Published tariff Chesapeake and Ohio Company.	Result.	
Year.	Month.	Tons.	Pounds.		Average cost of coal at mines.	Average cost ocean transportation.	Average cost discharging.			Loss to Chesapeake and Ohio per ton.	Profit to Chesapeake and Ohio per ton.
1897	July	28,890	1,140	$2.845	$0.700	$0.651	$0.226	$1.268	$1.373	$0.105	.....
	Aug	21,619	2,110	2.823	.700	.637	.223	1.263	1.390	.127	.....
	Sept	27,629	870	2.850	.700	.666	.222	1.262	1.362	.100	.....
	Oct	30,129	780	2.843	.700	.657	.224	1.262	1.369	.107	.....
	Nov	29,122	1,980	2.841	.700	.658	.221	1.262	1.371	.109	.....
	Dec.....	33,095	1,270	2.826	.700	.675	.228	1.223	1.347	.124	.....
1898	Jan.....	39,177	660	2.846	.700	.699	.226	1.221	1.325	.104	.....
	Feb.....	45,038	1,310	2.806	.700	.664	.229	1.213	1.357	.144	.....
	Mar	37,704	190	2.858	.700	.709	.218	1.231	1.323	.092	.....
	Apr.....	30,125	1,760	2.815	.700	.619	.226	1.270	1.405	.135	.....
	May	30,128	880	2.824	.700	.649	.228	1.247	1.373	.126	.....
	June ...	40,176	370	2.832	.700	.650	.223	1.259	1.377	.118	.....
	July	20,489	1,540	2.858	.700	.561	.221	1.376	1.468	.092	.....
	Aug	21,769	180	2.841	.700	.549	.220	1.372	1.481	.109	.....
	Sept	21,551	710	2.871	.700	.582	.219	1.370	1.449	.079	.....
	Oct	47,642	1,430	2.819	.700	.522	.231	1.366	1.497	.131	.....
	Nov	27,693	2,020	2.846	.700	.553	.219	1.374	1.478	.104	.....
	Dec.....	23,973	700	2.824	.700	.932	.224	.968	1.094	.126	.....
1899	Jan.....	28,321	2,180	2.834	.711	1.061	.221	.841	.468	.....	$0.373
	Feb.....	10,414	2,180	2.858	.707	1.237	.212	.702	.301	.....	.401
	Mar	28,337	1,290	2.866	.718	1.036	.324	.788	.90	.112	.....

TABLE III—Continued.

Period.		Amount delivered.		Average contract price per ton received from New York, New Haven and Hartford Company.	Outlay per ton required to deliver coal at New England points excluding tariff of Chesapeake and Ohio Company.			Amount left to pay published tariff of Chesapeake and Ohio.	Published tariff Chesapeake and Ohio Company.	Result.	
Year.	Month.	Tons.	Pounds.		Average cost of coal at mines.	Average cost ocean transportation.	Average cost discharging.			Loss to Chesapeake and Ohio per ton.	Profit to Chesapeake and Ohio per ton.
1899	Apr.....	52,353	120	$2.846	$0.699	$0.981	$0.213	$0.953	$0.90	.....	$0.069
	May	33,037	160	2.858	.699	.788	.226	1.145	.90	.....	.245
	June ...	33,644	810	2.812	.697	.703	.222	1.190	.80	.....	.390
	July	51,827	920	2.817	.697	.780	.221	1.119	.80	.....	.319
	Aug	23,794	150	2.823	.700	.775	.232	1.116	.80	.....	.316
	Sept	17,600	1,400	2.837	.700	.831	.231	1.095	.80	.....	.295
	Oct	22,406	390	2.826	.700	.936	.220	.970	.80	.....	.170
	Nov	27,025	22	2.836	.699	1.353	.219	.565	.80	$0.235	.....
	Dec.....	31,272	950	2.823	.696	1.368	.218	.541	.80	.259	.....
1900	Jan.....	23,859	220	2.853	.696	1.420	.210	.527	.85	.323	.....
	Feb.....	19,709	200	2.805	.695	1.348	.217	.545	1.00	.455	.....
	Mar	13,240	410	2.844	.699	1.414	.222	.509	1.00	.491	.....
	Apr.....	18,438	1,080	2.850	.924	1.223	.221	.482	1.15	.668	.....
	May	34,129	1,280	2.815	.926	.795	.219	.875	1.15	.275	.....
	June....	30,208	964	2.852	.924	.730	.224	.974	1.15	.176	.....
	July	24,109	1,890	2.822	.928	.694	.228	.977	1.15	.173	.....
	Aug	26,200	1,560	2.814	.923	.655	.221	1.015	1.15	.135	.....
	Sept	36,176	2,190	2.834	.924	.785	.229	.896	1.15	.254	.....
	Oct	46,906	690	2.845	.923	.769	.225	.928	1.15	.222	.....
	Nov	32,820	1,580	2.843	.926	.697	.227	.993	1.15	.157	.....
	Dec.....	26,023	1,330	2.803	.924	.662	.226	.991	1.15	.159	.....
1901	Jan.....	33,716	1,750	2.840	.922	.742	.216	.960	1.15	.190	.....
	Feb.....	43,912	1,240	2.809	.922	.677	.222	.988	1.15	.162	.....
	Mar	48,215	340	2.840	.924	.708	.226	.982	1.15	.168	.....
	Apr.....	24,512	100	2.807	.948	.661	.233	.965	1.25	.285	.....
	May	43,472	650	2.846	.949	.737	.221	.939	1.25	.311	.....
	June....	41,494	1,200	2.813	.949	.676	.227	.961	1.25	.289	.....
	July	32,392	1,460	2.825	.949	.772	.229	.875	1.25	.375	.....
	Aug	36,254	960	2.833	.949	.775	.232	.877	1.25	.373	.....
	Sept	32,424	100	2.841	.949	.784	.225	.883	1.25	.367	.....
	Oct	40,808	460	2.823	.949	.773	.222	.879	1.25	.371	.....
	Nov	36,276	1,050	2.821	.950	.776	.228	.867	1.25	.383	.....
	Dec.....	15,025	1,940	2.797	.950	.768	.218	.861	1.25	.389	.....
1902	Jan.....	34,870	1,610	2.828	.950	.839	.221	.818	1.25	.432	.....
	Feb.....	26,997	260	2.826	.950	.796	.233	.847	1.25	.403	.....
	Mar	31,140	1,800	2.818	.950	.797	.222	.849	1.25	.401	.....
	Apr.....	35,615	2,150	2.845	.950	.834	.224	.837	1.25	.413	.....
	May	39,500	1,655	2.815	.950	.801	.221	.843	1.25	.407	.....
	June....	7,150	1,930	2.791	.950	.773	.191	.877	1.25	.373	.....

Upon the default of the Chesapeake and Ohio Company under the aforesaid contract of December 3, 1896, the New York, New Haven and Hartford Company purchased coal in the open market to make up the shortage of 59,966 tons, and then presented a claim against the former company for $103,910.69, the difference between the cost of the coal at the market price and what the cost would have been on the basis of the contract price, the price of coal having greatly increased owing to strikes among the miners. In lieu of the payment of this claim it was verbally agreed between the two companies some time in April, 1903, that the Chesapeake and Ohio Company should complete the performance of its original contract, that is, deliver or cause to be delivered to the New York, New Haven and Hartford Company 55,966 tons of coal at $2.75 a ton, New Haven basis, the New York, New Haven and Hartford Company further agreeing to accept coal from the Kanawha district instead of the New River district as stipulated in the original contract; and at the time the petition in this case was filed, July 13, 1903, there had been delivered under this verbal agreement 38,077 tons, which were shipped from the Kanawha district in West Virginia to Newport News, Va., over the line of the Chesapeake and Ohio Company, and thence by water to New England points. This coal was furnished by the Kanawha Fuel Company, a selling agency, which, pursuant to a verbal understanding with the presidents of the Chesapeake and Ohio Coal and Coke Company

and the Chesapeake and Ohio Railway Company, delivered the coal to the coal and coke company, which, in accordance with the same verbal understanding, shipped and delivered it to the New York, New Haven and Hartford Railroad Company on behalf of the Chesapeake and Ohio Railway Company. The last-named company settled for the coal by paying the coal and coke company the difference between the cost of the coal to the latter delivered at New England points and the selling price collected from the New York, New Haven and Hartford Company. The services performed by the coal and coke company would thus appear to have been gratuitous, as claimed.

During the time these shipments under the verbal agreement of April, 1903, were made the Chesapeake and Ohio Company's published rate from the Kanawha district to Newport News, on coal destined to points beyond the Capes, was $1.45 a ton. Repeating here the same arithmetical process employed a while ago in connection with deliveries under the written contract of December 3, 1896, it is found that, subtracting the sum of the items which made up the cost of the coal per ton to the Chesapeake and Ohio Company, laid down at New England points (namely, the cost of the coal at the mines, the cost of ocean transportation, and the cost of discharging), from the price per ton received for the coal by the Chesapeake and Ohio Company from the New York, New Haven and Hartford Company, the amount left to pay the Chesapeake and Ohio Company its published rate of $1.45

a ton for transporting the 38,077 tons of coal from the Kanawha fields to Newport News was only about $0.39 a ton, which was inadequate by about $1.06 a ton and by upward of $40,000 in the aggregate. In the subjoined table these results are worked out in detail for each month.

TABLE IV.

Period.		Amount delivered.		Average contract price per ton received from New York, New Haven and Hartford Company.	Outlay per ton required to deliver coal at New England points, excluding tariff of Chesapeake and Ohio Company.			Amount left to pay published tariff of Chesapeake and Ohio Company.	Published tariff of Chesapeake and Ohio Company.	Result.	
Year.	Month.	Tons.	Pounds.		Average cost of coal at mines.	Average cost ocean transportation.	Average cost discharging.			Loss to Chesapeake and Ohio Company per ton.	Profit to Chesapeake and Ohio Company per ton.
1903.	May	17,627	2,160	$2.805	$1.28	$0.932	$0.223	$0.36	$1.45	$1.09	.....
	June ...	16,141	1,870	2.801	1.28	.870	.231	.42	1.45	1.03	.....
	July	4,309	.....	2.810	1.28	.900	.250	.37	1.45	1.08	.....

It is thus demonstrated by the facts furnished by the defendants themselves that under the written contract of December 3, 1896, and the verbal contract of April, 1903, the Chesapeake and Ohio Company sold, transported, and delivered to the New York, New Haven and Hartford Company nearly 2,000,000 tons of bituminous coal for a price which, after paying the cost of the coal at the mines, the cost of ocean transportation from Newport News to New England points, and the cost of discharging, failed, by an amount ranging from $0.079 to $1.09 a ton, and aggregating over $340,000 on all shipments, to yield to the Chesapeake and Ohio Company its published tariff for transporting

the coal from the coal fields to Newport News. The petition filed herein by the Interstate Commerce Commission alleged that this was tantamount to transporting the coal for that much less than the Chesapeake and Ohio Company's published rates, in violation of the acts to regulate commerce, and prayed, in effect, among other things, that further deliveries by the Chesapeake and Ohio Company under the terms of its verbal contract of April, 1903, with the New York, New Haven and Hartford Company be enjoined (the written contract of December 3, 1896, was not then in force, of course), and that the Chesapeake and Ohio Company be enjoined, following the language of the act to further regulate commerce with foreign nations and among the States, approved February 19, 1903, to observe its published rates on coal in the future.

The Circuit Court sustained the petition, not, however, upon the ground advanced therein, that the course of dealing between the two defendants was tantamount, in legal effect, to the Chesapeake and Ohio Company's transporting the coal in question for itself, as a vendor and shipper, at less than its published rates of freight, but upon the ground that the transactions denounced in the petition worked a discrimination against all other coal shipped to New York and New England points from the West Virginia mines, in violation of section 3 of the act to regulate commerce; and the court enjoined the further carrying out of those particular transactions, but did not enjoin upon the Chesapeake and Ohio Company to observe its pub-

lished rates on coal in the future, as prayed in the petition. The decree is as follows:

> This cause having been argued by counsel, and the record and said arguments having been considered, for reasons set out in a written opinion now filed, it is adjudged, ordered, and decreed:
>
> (1) That the claim of the New York, New Haven and Hartford Railroad Company against the Chesapeake and Ohio Railway Company for $103,910.69, asserted as damages arising from the partial nonperformance by said railway company of the contract of December 3, 1896, set out in the record, is, as to the whole of said claim and as to interest thereon, an illegal and unenforceable claim.
>
> (2) That the verbal agreement between said companies, made in April, 1903, and set out in said record, whereby said railway company undertook to furnish to said railroad company 59,966 tons of coal, to be transported from West Virginia to Newport News, Va., over the line of said railway company, and thence transported by vessel to certain New England ports, said coal to be delivered at said ports at the price of $2.75 per ton, New Haven basis, is an invalid and illegal agreement.
>
> (3) That the said Chesapeake and Ohio Railway Company, and all its officers, agents, and employees be, and they are hereby, perpetually enjoined and restrained from, in any manner, direct or indirect, executing or performing, or attempting to execute or perform, either the said contract of 1896 or said agreement of

April, 1903, and from in any manner discharging or satisfying any obligation, or seeming obligation, arising from said agreements, or either of them, or arising from any agreement or arrangement made in lieu of said agreements, or either of them.

(4) That said New York, New Haven and Hartford Railroad Company, and all its officers, agents, and employees be, and they are hereby, perpetually restrained and enjoined from demanding, or seeking the enforcement of, in any manner, the payment of all or of any part of its above-mentioned claim of $103,910.69, or of any interest thereon, or from accepting, directly or indirectly, payment or satisfaction in any form of all or any part of said claim, or interest thereon. And they are also enjoined and restrained from enforcing, or attempting to enforce, in any manner whatever, directly or indirectly, the aforesaid verbal agreement of April, 1903, and from accepting, directly or indirectly, any performance, partial or entire, of said agreement, or any payment or other satisfaction either in lieu of performance, or as damages for nonperformance.

(5) That the defendants herein each pay its own costs herein incurred, and that the Chesapeake and Ohio Railway Company pay the costs in this behalf incurred by or for the complainant, the Interstate Commerce Commission.

The Interstate Commerce Commission thereafter moved the court to enlarge the decree so as to make it enjoin upon the Chesapeake and Ohio Company to observe its published rates on coal in the future, as the

Commission contended the court might do under the provisions of section 3 of the aforesaid act of February 19, 1903, the so-called Elkins Act. This motion was overruled, however, the court taking the position that the act referred to authorized an injunction of that character only where the carrier was transporting freight at less than its published rates, and that therefore it could not order such an injunction in the case before it because it had already declined to hold, upon the facts disclosed, that the Chesapeake and Ohio Company was transporting freight for less than its published rates.

The defendant, the New York, New Haven and Hartford Company, prosecuted an appeal from the decree of the Circuit Court because the petition was not dismissed as to it, and the Commission prosecuted a cross appeal because, although the petition was sustained, it was sustained upon a ground different from that advanced by the Commission, and as a result the Commission was not granted the relief it sought.

The assignment of errors of the New York, New Haven and Hartford Company is as follows:

> The defendant, New York, New Haven and Hartford Railroad Company, prays an appeal from the final decree of this court to the Supreme Court of the United States, and assigns for error—
>
> First. That the said Circuit Court of the United States for the Western District of Virginia erred in adjudging, ordering, and decreeing that the claim of the New York, New Haven

and Hartford Railroad Company against the Chesapeake and Ohio Railway Company for $103,910.69, asserted as damages arising from the partial nonperformance by said railway company of the contract of December 3, 1896, set out in the record, is, as to the whole of said claim, and as to interest thereon, an illegal and unenforceable claim.

Second. That the said court erred in adjudging, ordering, and decreeing that the verbal agreement between said companies, made in April, 1903, and set out in said record, whereby said railway company undertook to furnish to said railroad company 59,966 tons of coal, to be transported from West Virginia to Newport News, Va., over the line of said railway company, and thence transported by vessel to certain New England ports, said coal to be delivered at said ports at the price of $2.75 per ton, New Haven basis, is an invalid and illegal agreement.

Third. That the said court erred in adjudging, ordering, and decreeing that the said Chesapeake and Ohio Railway Company, and all its officers, agents, and employees, be, and they are hereby, perpetually enjoined and restrained from in any manner, directly or indirectly, executing or performing, or attempting to execute or perform, either the said contract of 1896, or said agreement of April, 1903, and from in any manner discharging or satisfying any obligation, or seeming obligation, arising from said agreements, or either of them, or arising from any agreement or arrangement made in lieu of said agreements, or either of them.

Fourth. That the said court erred in adjudging, ordering, or decreeing that said New York, New Haven and Hartford Railroad Company, and all its officers, agents, and employees, be, and they are hereby, pepetually restrained and enjoined from demanding, or seeking the enforcement of, in any manner, the payment of all or of any part of its above-mentioned claim of $103,910.69, or of any interest thereon, or from accepting, directly or indirectly, payment or satisfaction in any form of all or any part of said claim, or interest thereon. And they are also enjoined and restrained from enforcing or attempting to enforce, in any manner whatever, directly or indirectly, the aforesaid verbal agreement of April, 1903, and from accepting, directly or indirectly, any performance, partial or entire, of said agreement, or any payment or other satisfaction, either in lieu of performance, or as damages for nonperformance.

Fifth. That the said court erred in not dismissing the complaint of the complainant in said case.

Sixth. That said court erred in holding that the facts proven in said case constituted any violation of the third section of the interstate-commerce act.

Seventh. That the interpretation put upon the language of the third section of the interstate-commerce act by the said court in its opinion and decree is erroneous and unjust to the said appellant, and the appellant is not in the complaint in this case alleged to have violated the said section or any of the provisions thereof.

Eighth. That this said court erred in holding and deciding that the complaint duly alleged and charged that an offense had been committed by the appellant against the provisions of the third section of the interstate-commerce act, and in finding that there was evidence to sustain such charge.

Ninth. That the said decree is in other respects erroneous and unjust to this appellant.

Wherefore the appellant prays that the decree of the said Circuit Court be reversed.

The assignment of errors of the Interstate Commerce Commission is as follows:

The plaintiff, the Interstate Commerce Commission, prays an appeal from the final decrees of this court, entered in the above-styled cause on the 19th day of February, 1904, and the 14th day of March, 1904, to the Supreme Court of the United States, and assigns for error:

1. That the Circuit Court of the United States for the Western District of Virginia, after finding that the claim of the New York, New Haven and Hartford Railroad Company against the Chesapeake and Ohio Railway Company for $103,910.69, asserted as damages arising from a partial nonperformance by said railway company of a contract of December 3, 1896, set out in the record, is, as to the whole of said claim and interest thereon, an illegal and unenforceable claim, and after finding that the verbal agreement between said companies, made in April, 1903, and set out in said record, whereby said railway company undertook to furnish to said railroad company, and thence

transport by vessels to certain New England ports, said coal to be delivered at said ports at the price of $2.75 per ton, New Haven basis, to be an invalid and illegal agreement; that said court merely enjoined and restrained the said Chesapeake and Ohio Railway Company, its officers, agents, and employees, from, in any manner, direct or indirect, executing or performing or attempting to execute or perform either said contract of December 3, 1896, or said agreement of April, 1903, and from in any manner discharging or satisfying any obligation or seeming obligation arising from said agreements, or either of them, or arising from any arrangement or agreement made in lieu of said agreements, or either of them; whereas said court should have further enjoined and restrained the Chesapeake and Ohio Railway Company from giving to said railroad company, or to any other person, firm, or company, any undue or unreasonable advantage or preference, and should further have restrained and enjoined the Chesapeake and Ohio Railway Company from transporting coal from one State to or through any other State for the New York, New Haven and Hartford Railroad Company, or for any firm, person, or company, at a less rate than the duly established freight rate of the said railway company in force at the time, and from further failing to observe its published tariffs, or from giving to the said New York, New Haven and Hartford Railroad Company, or to any person, firm, or company, in any manner whatsoever, any undue or unreasonable

preference or advantage, and said decree, entered by the court on the 19th day of February, 1904, in addition to the provisions thereof, should have enjoined and restrained the New York, New Haven and Hartford Railroad Company and its officers and agents from seeking or accepting in any manner any direct or indirect rebate of the duly established freight rates of the Chesapeake and Ohio Railway Company on any interstate commerce, and from seeking or accepting in any manner from said railway company any undue or unreasonable preference or advantage.

2. And whereas, on the 4th day of March, 1904, the complainant, the Interstate Commerce Commission, moved the said court to amend the order entered in the above cause on the 19th day of February, 1904, by inserting the following paragraph:

And the defendant, the Chesapeake and Ohio Railway Company, is restrained and enjoined from transporting coal from one State to, into, or through any other State for the New York, New Haven and Hartford Railroad Company, or for any other person, firm, company, or corporation, at a less rate than the duly established freight rate of the Chesapeake and Ohio Railway Company, in force at the time, and filed with the Interstate Commerce Commission.

And whereas the court, by order, entered herein on the 14th day of March, 1904, overruled the complainant's motion, and declined to change or amend the order entered herein as aforesaid on the 19th day of February, 1904,

it is assigned as error that the said modification of the order of the 19th of February, 1904, should have been made by the court herein.

3. It is further assigned as error that the court found that the loss made by the Chesapeake and Ohio Railway Company from July 1, 1897, to July 1, 1902, in the transportation of the coal in the record set forth by the Chesapeake and Ohio Railway Company, for the New York, New Haven and Hartford Railroad Company, was a loss by the Chesapeake and Ohio Railway Company as a vender of coal; whereas the court should have held that such loss occurred by reason of the Chesapeake and Ohio Railway Company charging to the New York, New Haven and Hartford Railroad Company, or to the shipper of said coal, less than the published tariff rates of the Chesapeake and Ohio Railway Company within and during said period, in force and duly filed as required by law.

4. That the court held that the loss by the Chesapeake and Ohio Railway Company in the transportation of coal for the New York, New Haven and Hartford Railroad Company, after April 1, 1903, was a loss to the Chesapeake and Ohio Railway Company as vendor of said coal, whereas the court should have held that the loss to the Chesapeake and Ohio Railway Company was really a cut or rebate or departure from its established tariffs of rates on coal, in effect during said period.

5. The court should have held that the contract between the Chesapeake and Ohio Rail-

way Company and the New York, New Haven and Hartford Railroad Company of December 3, 1896, was absolutely void and illegal, being in violation of the act to regulate commerce, and for failure to deliver coal thereunder, it should have been held that no liability could be successfully asserted against the Chesapeake and Ohio Railway Company.

6. The court should have held that no legitimate claim for damages could be asserted against the Chesapeake and Ohio Railway Company for failure to deliver coal under the contract of December 3, 1896, and that said contract was not binding on the said Chesapeake and Ohio Railway Company.

7. The court should have held that the contract of December 3, 1896, between the Chesapeake and Ohio Railway Company and the New York, New Haven and Hartford Railroad Company, was an option to the New York, New Haven and Hartford Railroad Company to take, within five years, any amount of coal which it may want, not to exceed 2,000,000 tons, and not exceeding 400,000 tons per annum, and the court should have held further that the Chesapeake and Ohio Railway Company had the option on July 1, 1902, to cancel all portions of said quantity of coal remaining undelivered.

8. The court should have held that the Chesapeake and Ohio Railway Company was guilty of discrimination as defined in section 2 of the act to regulate commerce in the carriage and delivery of the coal to the New York, New Haven and Hartford Railroad Company.

9. The court should have held that the Chesapeake and Ohio Railway Company violated the provisions of the act of Congress approved February 19, 1903, in that it was engaged in the carriage of freight traffic between given points at less than its published rates on file, and that said railway company was committing a discrimination forbidden by law, and the court should have entered such an order as would have enforced, on the part of the Chesapeake and Ohio Railway Company, an observance of its published tariffs, and should have directed and required of the Chesapeake and Ohio Railway Company a discontinuance of such discrimination; and the court should have made said order apply to the Chesapeake and Ohio Railway Company and to the New York, New Haven and Hartford Railroad Company, the latter being the party interested in the traffic.

Wherefore the plaintiff prays that the decree of the said Circuit Court, in declining to amend said decree, be reversed, and that the decree of February 19, 1904, be amended and be made to conform to such an order as the Circuit Court aforesaid should have entered.

THE ARGUMENT.

The interest of the Government in this litigation and its position upon the questions of law involved may be put in a clearer light, I think, and the whole discussion simplified, if in place of the foregoing assignments of error the following single assignment be substituted:

The Circuit Court erred in deciding that the Chesa-

peake and Ohio Company was not transporting freight for less than its published rates, when, as the court found to be the fact, that company sold and was delivering coal to the New York, New Haven and Hartford Company at New England points for a price less than sufficient to pay its published rates for transporting the coal over its line from the mines to Newport News after taking out of the price so received the cost of the coal at the mines, the cost of ocean transportation from Newport News to New England, and the cost of discharging.

This proposition lays bare the one vital issue in the case, and inasmuch as a decision upon that issue in favor of the Government's contention will decide the case, it will not be necessary to discuss any other question except in so far as the solution of this one may depend upon the solution of others.

I shall admit, for the purposes of this argument, that under both the written contract of December 3, 1896, and the verbal contract of April, 1903, the Chesapeake and Ohio Company was the vendor and shipper of the coal, and the New York, New Haven and Hartford Company the vendee and consignee, and that the last-named company at no time became the shipper, and therefore at no time could have received any rebates or concessions from the Chesapeake and Ohio Company's published freight rates. These admissions agree with the contentions of the defendants and with the findings of the Circuit Court, and by making them the field of controversy is cleared of mere questions of fact or of mixed law and fact. In further ex-

planation of these admissions upon points disputed in the court below it may be said that it is of comparatively little moment to the Government that the petition of the Interstate Commerce Commission be sustained on *some* ground, and that a decree be entered merely enjoining the Chesapeake and Ohio Company from delivering the few tons of coal that remain undelivered under the verbal contract of April, 1903. The special importance of this case lies in the fact that it presents to this court for the first time the novel and exceedingly important question of construction of the acts to regulate commerce stated in the substituted assignment of error.

Briefly recapitulated, the facts hereinbefore stated or admitted show that at the time the petition in this case was filed the Chesapeake and Ohio Railway Company, a corporation organized under the laws of the State of Virginia to operate a line of railway, was, as a vendor and shipper, and pursuant to a verbal agreement made in April, 1903, delivering bituminous coal to the New York, New Haven and Hartford Railroad Company at points in New England for a price which, after paying the cost of the coal at the mines, the cost of ocean transportation from Newport News to New England, and the cost of discharging at the end of the ocean voyage, left the Chesapeake and Ohio Company only an amount ranging from $0.36 to $0.42 a ton with which to pay itself, as carrier, its published rate of $1.45 a ton for transporting the coal from the mines to Newport News. (See Table IV, *supra*.)

The facts recited also show that from July 1, 1897, to July 1, 1902, an exactly similar course of dealing in bituminous coal went on between the two defendants under a written agreement dated December 3, 1896, and with similar results (see Table III, *supra*), except that during a few months of the term of this contract the price received for the coal by the Chesapeake and Ohio Company was sufficient to pay its published tariff for the haul from the mines to Newport News, after deducting all cost items, a condition due to the fact that during these months the Chesapeake and Ohio Company's tariff on coal from the West Virginia mines to Newport News was much lower than it was before or has been since. However, this being a proceeding to restrain future violations of the law and not to punish past ones, this contract and the transactions thereunder are material only in connection with the answer hereafter to be made to the contention of the defense, that the New York, New Haven and Hartford Company held a valid liquidated claim against the Chesapeake and Ohio Company, amounting to $103,910.69, for nondeliveries under said contract, the cancellation of which claim the latter company might and did accept in payment for the carriage of freight for the former at the published rates, and that therefore to compute the full consideration that the Chesapeake and Ohio Company received for transporting to Newport News the coal which it sold to the New York, New Haven and Hartford Company under the verbal agreement of April, 1903, the amount

of this claim should be added to what was left of the purchase price under that agreement after the Chesapeake and Ohio Company had paid all cost items, namely, the cost of the coal at the mines, the cost of ocean transportation, and the cost of discharging.

The contention of the Government, upon the facts just recapitulated, is that where a corporation chartered to operate a line of railway undertakes the dual rôle of vendor-shipper and carrier, as the Chesapeake and Ohio Company did under the aforementioned verbal agreement of April, 1903, and receives for merchandise, which it sells and ships over its own line, a price insufficient to pay the cost of carriage over its line computed at the published rates, after taking out the cost of the merchandise laid down at the vendee's place of business, the law will *presume* that the resulting loss was sustained by the corporation in its capacity as carrier and not in its capacity as vendor-shipper; in other words, that the merchandise was transported for less than the published rates, the measure of the deficiency being the difference between the sum of all the cost items, including the cost of transportation computed at the published rates, and the selling price.

To demonstrate the soundness of this position it is only necessary, I think, to point out what would be the result if the law should not step in and raise the presumption contended for from the facts recited. If it should not, a moment's reflection will reveal that it must either (1) be left entirely to the carrier to say whether the loss was sustained as carrier, and hence

whether the goods were transported for less than the published rates, or whether the loss was sustained as vendor—which is to leave it to the carrier to decide whether it has violated the statute; or (2), which is only a shade less absurd, the law must presume that the loss was sustained as vendor. This must be so, because the issue is not one susceptible of proof. The facts are not in dispute, the controverted point being what is the proper inference to be drawn from admitted facts, and unless it is to be left to the carrier to decide whether or not it has violated the statute, which is impossible, of course, the law must either draw the inference that the loss was sustained as carrier or that it was sustained as vendor; and it would, in my judgment, outrage reason and common sense, as well as our knowledge of the passion of self-interest, to accept the conclusion that a carrier would buy merchandise and transport it to a point and sell it there for less than cost in preference to the conclusion that, being its own carrier, it charged itself less for the transportation than it would have charged others, and in that way made a profit out of the transaction, notwithstanding that the price which it received was less than the sum of the cost of the merchandise and the cost of transportation computed at published rates.

But if there were any doubt as to which of the two is the proper inference to be drawn in such a case, that is, whether it should be presumed that the loss was sustained as carrier or as vendor, the evil consequences sure to follow if the latter inference were

drawn would furnish cogent and abundant reason for resolving the doubt in favor of the former. If a railroad company having authority to buy and sell merchandise, or usurping authority to do so with the acquiescence of the State which created it, may transport goods to market over its own line and sell them there for less than the cost of the goods plus the cost of the transportation computed at the published rates, manifestly it may destroy every producer and shipper along its line. Or worse yet, and a much more likely result, it might purchase goods from producers whom it desires to favor at fair or, if it choose, high prices, and transport these goods to the markets and sell them for more than their cost, but for less than the sum of their cost and the railroad company's published rate for the transportation, to the utter ruin of all other producers of the same class of goods along its line. There would thus have been found a new, convenient, and safe means—safe because beyond the reach of the law—to evade our supposedly stringent statutes against rebates and concessions from the published rates of common carriers, and the latter might grant, and powerful shippers might exact, with impunity those undue preferences and advantages in transportation, universally condemned, which have wrought such grievous injustice in the past, and which the legislative and executive branches of the Government have been persistently laboring to stamp out.

I shall now advert briefly to the reasons which persuaded the learned judge of the Circuit Court to reject

the Government's contention that in a case such as this the law will presume that the loss was sustained as carrier and not as vendor.

He concedes "that where [as was the case here], at the very inception of the contract, there is a loss to the vender-carrier, it is somewhat difficult to ascribe an intent to lose on the article dealt in, rather than an intent to simply carry at less than the rates given to the public." (Record, p. 221.) And he also concedes "that the effect to the carrier, to its vendee, and to the *public*, is exactly the same, whether the transaction be considered as a loss on carriage (and hence a rebate on freight rates) or as a loss suffered on the article dealt in." (Record, p. 222.) But, notwithstanding, he shrinks from presuming that the loss was suffered as carrier, rather than as vender, because he finds no evidence of an *intent* to carry at less than the published rates of the Chesapeake and Ohio Company. (Record, p. 221.) He states: "There is no evidence that, at the time he made the contract of 1896, Mr. Ingalls knew the prices he must pay the coal operators or the water carriers. * * * When the contract of 1896 was made, Mr. Ingalls may have expected to purchase the coal at so low a price that the aggregate of cost items and the Chesapeake and Ohio freight rate would have been at least equaled by the contract price to be paid by the New Haven Company."

In the first place it is not necessary in this case to prove intent. The *fact* of carriage at less than published rates constitutes the violation of the statute.

But granting that it were material, intent is something that can seldom be proved directly. It must generally be proved by inferences from other facts. And as the learned judge below himself concedes that upon the facts of this case it is difficult "to ascribe an intent to lose on the article dealt in," and as no evidence of such an intent was produced, surely it is consistent with justice and with the probabilities of the case to presume the only other possible intent, namely, an intent to suffer the loss as carrier. Furthermore, there is evidence in the record (affidavit of comptroller of Chesapeake and Ohio Company, record, p. 187) showing that the Chesapeake and Ohio Coal Agency Company, which acted as agent of the Chesapeake and Ohio Railway Company in making deliveries of coal under the agreement of December 3, 1896, in settling with its principal, the railway company, deducted from the price received from the New York, New Haven and Hartford Company the cost of the coal and all other cost items, turning over to the railway company the balance, which, as heretofore demonstrated, was insufficient to pay its published rates for hauling the coal to Newport News. This shows that the parties themselves dealt with the loss as a loss on carriage, and the *fact* that they did so treat it is cogent evidence that it was their *intent* that it should be so treated. I fail to see how anything can be made of the point that there is no evidence that the president of the Chesapeake and Ohio Company knew at the time the contract of December 3, 1896, was made what prices he would have

to pay for the coal and for ocean transportation, and that, for all that the evidence shows, he may have expected such prices to be so low that the sum of all the cost items and the Chesapeake and Ohio Company's published charges for transporting the coal would not exceed the price contracted to be paid by the New York, New Haven and Hartford Company. If necessary it would be presumed that he knew what the coal and the ocean transportation would cost, since it is unreasonable to suppose that a person will sell goods without having informed himself what they will cost him.

The court below also puts the following case: "Let us suppose," it says, "that the Chesapeake and Ohio were to make a contract to deliver New River coal to a purchaser in New England at a price which at the time covered the cost of the coal, its own published freight charges, and all water costs. We will also assume, as we are seeking an illustration, where the contract is made in perfect good faith that neither party to the contract has any reason to suppose that the cost of the coal or the water costs will, during the life of the contract, advance. With the contract price equal to all cost items and the carrier's full freight rate, I can not perceive any ground for assailing the legality of the contract or of acts done in performing it. When the cost items increase there is a loss to be suffered by the carrier-vendor. To say that this loss is necessarily a loss on carriage, and hence a rebate on freight rates to the purchaser, seems to me to beg the

question." (Record, p. 221.) I do not contend that in such a case the loss would necessarily be a loss on carriage. The contract here supposed would, I think, be a valid contract, assuming the carrier to have authority to buy and sell such merchandise, because there was no loss at its inception, and there is ground for saying that the loss subsequently suffered was sustained as dealer, for it was occasioned by an increase in the cost of coal.

The Circuit Court also suggested this case: Suppose a carrier has purchased a large quantity of some article, intending in the future to sell it and transport it to the vendee's place of business, and the market price afterwards declines, may not the carrier get rid of the article by selling it for a price less than sufficient to pay its published charges for transporting it to the vendee after taking out of the price the original cost? Granting that it may do this, the very most that the concession proves is that there may be exceptional cases where the reasons favorable to the presumption that the loss was suffered as dealer or vendor outweigh those favorable to the presumption that it was suffered as carrier; but of course it does not follow that a general rule must be rejected because it may be subject to occasional exceptions.

This completes the affirmative branch of the argument I set out to make. The point may be made that the provisions of the acts to regulate commerce against discrimination and failure to observe published rates are inapplicable where, as in this case, the railway

company which did the transportation was itself the shipper. I am unable to perceive any reason why this should be so. It seems an utterly immaterial and accidental circumstance that the shipper should be the same corporation which operates the railway over which the merchandise in question was transported to its destination. A railroad corporation can no more discriminate in favor of itself as shipper or producer by transporting merchandise for itself in that capacity at less than published rates than it can so discriminate in favor of a third party.

This view is supported by an opinion delivered by Judge Cooley, then chairman of the Interstate Commerce Commission, in the proceeding entitled *Haddock* v. *Delaware, Lackawanna & Western R. Co.* (3 I. C. C., 296, 316), in which he said:

> All these points, from the second to the sixth, inclusive, it is seen, elaborate and present in different forms the one main contention as regards shipments to the west and north under these contracts, that the respondent, as a common carrier of interstate traffic, being also a producer and purchaser and shipper on its own account, is by law precluded from unjust discrimination in its own favor; that any such unjust discrimination subjects it to the discipline of the act to regulate commerce and brings it within the regulating power of this Commission. It is to this general contention that we shall now direct what we have to say.
>
> We shall assume, in whatever will be said upon this case, that the underlying principle of

complainant's contention is sound and just. The respondent is a common carrier, charged with duties to all who may present themselves for carriage or offer their property for that purpose; and one of the highest of these duties is that it shall not discriminate as between those thus offering. This we assume to be the obligation of the common law, and of the constitutional and statutory law of Pennsylvania as well. Whether by the contracts brought into the case there was discrimination as between the complainant and other persons, of which such other persons might find fault, is a question not before us and not in any way involved in this proceeding. We proceed, as already said, upon the assumption that the contracts were valid when made.

But we are confronted here with a situation that is peculiar, and elsewhere than in the coal regions of the country would be regarded as extraordinary. Respondent is not only a carrier for all other persons who may offer, and charged with duties of impartiality as such, but it is also itself a shipper over its own lines. It may be said to offer to itself property for transportation, and this not merely casually and for some temporary or special purpose, but regularly and as a very large part of its business. Indeed, it is probably true that respondent became a carrier because of having immense quantities of property to be carried, and that its line was constructed mainly for its own purposes as owner and shipper, the business of common carrier being added to that of producer and dealer in coal with a view to an

> additional profit or to lessen the cost of conducting the primary business. The situation is what creates the difficulty in dealing with the case. It presents the question of impartiality in such a manner that it may not be possible to deal with it as it would in general be deal with if it were to arise as a question affecting rights as between third parties who were shippers only. It might be easy to apply the rule against unjust discrimination in that case, while it might be difficult to call it a rule against unjust discrimination in this case. The right of the complaining party might be precisely the same in each case, and yet the situation might make the method of enforcement quite different, and might even require that a different term should be applied to the wrong from which the complainant suffered. No matter what the situation is, the respondent must not use its power and the means at its disposal as a carrier to avoid performing the full measure of its duty. It must not use them oppressively. It must, as far as possible, deal as between all shippers, including itself as a shipper, in such a way that all shall have proportional benefit whenever demanding its service.

It is true that the question that the chairman of the Commission had before him was whether a carrier might discriminate in favor of itself as shipper, but the same reasoning that would lead to the conclusion that a carrier may not discriminate in favor of itself as shipper would necessarily lead to the conclusion that a carrier may not charge itself as shipper less than its

published rates at the same time that it charges other shippers its full published rates, for that is the very essence of discrimination. It should also be noted that the practical difficulty in the way of separating the cost of the product shipped from the cost of the transportation in Haddock's case is not present in cases such as the one at bar.

The rule that a railway corporation can not in its capacity as carrier, discriminate in favor of itself when engaged in some business other than that of carrier over its line of railway, to the prejudice of others engaged in the same business, was also very emphatically announced by Chief Justice Cockburn in the case of *Baxendale et al.* v. *The Great Western Railway Company* (Railway and Canal Traffic cases, Vol. I, p. 202, S. C. 5, C. B., n. s., 336). The Chief Justice stated the facts of the case to be as follows:

> Down to a recent period the defendants, the Great Western Railway Company, charged a uniform rate of 3s. 6d. per ton on goods conveyed on their railway between their stations at Reading and Paddington. The goods were collected and delivered both by the company and the complainants, Messrs. Baxendale & Co., at a charge of 4s. 10d. per ton. The railway company have now raised the charge for carrying goods under 5 hundredweight to 8s. 4d. (being the aggregate of the former charge of carrying and that of collecting and delivering), with an intimation to the public that the company will collect and deliver goods free of all charges.

> It is alleged on the part of the complainants, and scarcely denied on the part of the defendants, that the real purpose of this arrangement is to compel persons desiring to have their goods conveyed by the railway to employ the railway company to collect and deliver such goods, and thus to secure this business and the profit upon it to the defendants, as well as to exclude the complainants from competing with the defendants in this department of business.

The reasoning employed in the opinion is throughout so peculiarly applicable to the case at bar that I shall quote from it at length. Said the chief justice:

> The main stand made by the counsel for the company was on the ground, first, that, although the legislature has imposed upon railway companies the obligation of affording accommodation on equal terms to the public, it can not have been their intention to deprive them of the right possessed by all trading companies, as well as by individuals, of using their property and managing their affairs, within the scope of the purpose for which they are constituted, in such manner as they think most to their advantage; and, secondly, that in the present instance the company had by act of Parliament the power of raising their rates at their own will and pleasure, provided they raised them equally as against all persons; that here they had raised them equally against all; and that it was not within the authority of this court to fix limits to the amount of accommodation which the company might think proper to

afford gratuitously beyond the conveyance by the railway, for which the toll was charged.

We think there is little difficulty in disposing of these arguments. It is abundantly clear from the statutory enactments which enjoin on railway companies the obligation to afford accommodation on equal and reasonable terms and from the provisions of the statute by which jurisdiction is given to this court against the affording of undue preference or the imposing of undue prejudice or disadvantage that it was not the intention of the legislature to leave to railway companies the unfettered exercise of their rights as proprietors of their respective lines; but, in return for the great powers which it has conceded to them and for the monopoly of the carrying business of the country, which in a great degree they have been enabled to acquire, has imposed on them the obligation of affording accommodation on equal terms to the whole of the public.

The policy and justice of such a requirement are manifest, it being obvious that the powers of a railway company and its monopoly, under the impossibility of all competition, might otherwise be converted into a means of very grievous oppression by a difference in point of charge, or in point of accommodation made in favor of one man at the expense of another, or by disadvantages in respect either of charge or accommodation imposed on one as compared with another. *And it is plain that the oppressive effects of such inequality will be equally great whether its motive and operation be to benefit third parties or the railway company itself.*

Such being plainly the intention of the legislature, and this court having been constituted the tribunal by which any injustice or inequality in the working of the railway system as between the companies and the public is to be redressed, we must endeavor to prevent any injustice either in the rate of charge or the degree of accommodation afforded, at the same time that we carefully avoid interfering, except where absolutely necessary for the above purpose, with the ordinary rights which (subject to the before-named qualification) a railway company, in common with every other company or individual, possesses of regulating and managing its own affairs, either with regard to charges or accommodation, or to the agreements and bargains it may make in its particular business.

Greater difficulty, no doubt, arises in dealing with cases in which the purpose and effect of the matter to be considered, although it may incidentally have the effect of prejudicing third parties, is in reality to the benefit of the company itself, than in those in which the immediate object is to give an undue advantage for the benefit of a third party; yet we think that no serious difficulty will be found in ascertaining the principles on which the authority of this court should be exercised.

It may be convenient, in the first place, to advert to a distinction not always kept sight of in argument between cases in which the interest of the company sought to be promoted by the regulation or act complained of is one

which arises with reference to the railway itself as to which the question occurs and those in which the benefit sought to be obtained by the company is one which has reference to interests distinct from those of the particular railway, as where, for example, the company are the proprietors of another railway or carry on some other business. In the latter class of cases it appears to us clear that the company must be taken to be, quoad, the particular railway, in the position of third parties; and that they can not, with a view to such separate interest, give an undue preference or impose an unreasonable disadvantage any more than they could do so to promote the interest of any other party. Thus, if a railway company, being proprietors of one line from A to B, and of another line from C to D, were, in order to obtain the custom of a particular individual on the first of these lines, on which they might be subject to competion from a rival line, to agree to convey his goods on the line from C to D at a cheaper rate than those of another person using only the latter line; or, if a railway company, carrying on, in addition to its business as carriers on the line, that of carriers to and from the termini of the railway, were, with a view to obtain additional custom in the latter, to carry on the railway, for those who employed them as carriers to and from the railway, at a lower rate than for those who did not; in both these cases we should have no difficulty in holding that the company must be considered, as regards these separate interests, in the light

of third parties, and that they can not promote their interests at the expense of the right of the public to that equality on the particular railway which it was the intention of the act of Parliament to secure.

Great difficulty and nicety perhaps arises in dealing with cases in which the purpose and effect of the thing complained of is the benefit of the company in their character of proprietors of the particular railway. In these cases the court might feel greater reluctance to interpose, partly from an unwillingness to interfere with parties in the management of their own affairs for their own advantage, partly from the disposition to give companies credit for acting on an enlightened view of their own interests as identified with those of the public; yet, if the court became clearly satisfied that a company was seeking to promote its own advantage by establishing an inequality which was unreasonable under the circumstances, and operated unfairly and injuriously upon particular individuals, or that it was affording to one person or set of persons an advantage which it would not afford to another under similar circumstances, this court would not hesitate to interfere to prevent such a result, although by so doing they might prevent the company from securing all the profit that it might otherwise derive from the use of its property.

* * * * *

We proceed to consider the second ground taken by the defendants, which is, in substance, that having power to raise their rates of charge for carrying on their line, and having done so

equally as regards all, they do not come within the statutory prohibition against undue preference or undue prejudice by affording other accomodation in addition to that of carrying on their line.

We think this argument rests upon two obvious fallacies: First, that of supposing that the whole charge in question is one made by the company in reference to their character and interests with respect to the railway, whereas in reality the charge is made by them in a character and interest independent of the railway, viz, as carriers to and from the termini of the railway; secondly, that the company can convert that which is in reality a charge for collecting and delivering, as well as for carrying, into one for carrying only by affixing to it the latter denomination in their table of rates.

It is true, no doubt, that the company's acts give them power to impose their own rates of charge for the carriage of this description of traffic; but these acts give them no power to impose tolls or charges for collecting and delivery; and it is palpably an abuse of their powers, if, under the name of a charge for carrying on their line, they impose, otherwise than with the assent of the parties concerned, a charge for a totally different thing. Again, although the legislature has conferred the power of imposing rates of charge, it has annexed to this power the obligation of imposing such rates equally; and the company can not be permitted to evade this obligation by colorably pretending that that which is in fact a charge for other

things as well as for carriage is a charge for carriage only.

The court is bound to look at the transaction in its true light, and can not suffer itself to be diverted from its duty of interfering to prevent what, in effect, is such an injustice as it was the purpose of the legislature to prevent, because the transaction is attempted to be covered over by a transparent disguise.

Looking, then, at the alteration in the rates in its true light, we are of opinion that the arrangement is objectionable both as an undue preference given on the one hand and as an unreasonable disadvantage imposed on the other. *It is an undue preferemce to the company in their separate capacity of carriers other than on the line of railway*, inasmuch as they thereby practically secure to themselves the entire monopoly of the last-mentioned traffic to the entire exclusion of the complainants and all others. It is an undue prejudice and unreasonable disadvantage imposed on the complainants, inasmuch as it is plain that their goods, and those of all persons employing them, as, indeed, the goods of all persons other than those who employ the company to collect and deliver, must be subjected, as compared with the goods of the latter, twice over to the expense attendant on collection and delivery if they employ others to collect and deliver for them, or to an unnecessary charge if they require no such accommodation.

It now remains to reply to the contention of the defense, that the New York, New Haven and Hartford

Company held a valid, liquidated claim against the Chesapeake and Ohio Company, amounting to $103,910.69, growing out of the latter's failure to deliver to the former certain quantities of bituminous coal which it had agreed to deliver under the aforementioned written contract of December 3, 1896, the cancellation of which claim, it was contended, the Chesapeake and Ohio Company might accept in payment for carrying freight for the New York, New Haven and Hartford Company at the published rates, and that therefore to get at the full consideration that the Chesapeake and Ohio Company received for transporting to Newport News the coal which it sold to the New York, New Haven and Hartford Company under the verbal agreement of April, 1903, the amount of this claim should be added to what was left of the purchase price under that agreement after the Chesapeake and Ohio Company had paid the cost of the coal and all other cost items, thus making the amount received for the transportation by the last-named company equal and exceed the cost of the transportation computed at the published rates.

The premises of this proposition may be conceded. That is, it may be conceded, for the purpose of the argument, that the Chesapeake and Ohio Company, without infringing the acts to regulate commerce, could cancel a valid, liquidated claim against it by transporting freight for the claimant until the amount owing for freight charges should, computed at the published rates, equal the amount of the claim. But

the conclusion drawn from this by the defendants does not follow, for in order that the hypothetical rule just stated may apply the freight must, of course, be carried for the claimant. The claimant must be the shipper. In the present case, however, the claimant, the New York, New Haven and Hartford Company, was not a shipper at all. This is not only the fact, but it was very strongly asserted by both of the defendants in their answers. Thus the Chesapeake and Ohio Company averred that the New York, New Haven and Hartford Company "was not a shipper of coal, and had no property in the coal alleged to have been carried, or to be under contract for carriage, until the same had been, or should be, delivered into its coal bins at the several points on its line." (Record, p. 47.) And the New York, New Haven and Hartford Company denied "that it now is or ever has been a shipper of coal over the lines of the Chesapeake and Ohio Railway Company." (Record, p. 58.) In point of fact the Chesapeake and Ohio Company, as heretofore shown, was carrying the coal for itself. It was the shipper.

Furthermore, it incurred the debt of $103,910.69 under a contract to sell and deliver coal. That is, it incurred it as a dealer in coal. nd it requires no elaborate argument to prove that a carrier corporation can not pay a debt contracted when it is acting the part of a dealer by transporting freight in its capacity as carrier, for in such an event it would have charged nothing for its services as carrier. There would in effect have been a rebate of the full tariff. It is no answer

to this to say that the Chesapeake and Ohio Company in that way discharged a debt. It must have incurred the debt as a carrier. When a corporation chartered to operate a railroad undertakes the additional rôle of vendor-shipper, that is, of a dealer in merchandise, it must not confuse its transactions as such with its transactions as carrier, but must, at its peril, keep the two sets of transactions separate and distinct, for the principles of law governing the relations arising out of the one set are often very different from those governing the relations arising out of the other. And this proposition is especially true where, as in this case, the carrier becomes a dealer in violation of its charter and in violation of the law of the State in which it bought the coal which it afterwards sold.

There is still another reason why the cancellation of this alleged claim can not be made to serve the purpose of bringing the consideration received by the Chesapeake and Ohio Company for transporting the coal delivered under the verbal agreement of April, 1903, up to an amount equal to or in excess of the cost of said transportation computed at the Chesapeake and Ohio Company's published rates, and that is that there was really no indebtedness to cancel as the claim is invalid, the contract out of which it grew, namely, the written contract of December 3, 1896, being an illegal contract.

Paragraph 4 of section 6 of the original act to regulate commerce provides as follows:

> And when any such common carrier shall have established and published its rates, fares,

> and charges in compliance with the provisions of this section, it shall be unlawful for such common carrier to charge, demand, collect, or receive from any person or persons a greater or less compensation for the transportation of passengers or property, or for any services in connection therewith, than is specified in such published schedule of rates, fares, and charges as may at the time be in force.

Therefore, under the statutes in force when the contract of December 3, 1896, was entered into, it was unlawful to transport freight for less than the published schedule of rates. And as it has been shown in the statement of facts that the contract of December 3, 1896, worked out the same results that the verbal contract of April, 1903, did, it follows that if I was successful in the earlier part of the argument in establishing the illegality of the latter contract on the ground that its performance by the Chesapeake and Ohio Company was, in legal effect, tantamount to that company's carrying freight for less than its published rates, then, for the same reasons, the former contract must be illegal and therefore incapable of supporting a valid claim.

I confess that I am unable to follow the *reasoning* (Record, bottom p. 223 to top of p. 226) by which the court below reached the conclusion that the contract of December 3, 1896, and necessarily also, the contract of April, 1903, accomplished violations of section 3 of the original act to regulate commerce. I agree with the conclusion, but rather upon the ground, repeatedly

stated, that as the price received for the coal was not sufficient, after paying all cost items, to yield the Chesapeake and Ohio Company its published rate for the transportation, that company, as carrier, had transported the coal for itself, as shipper, at less than its published rates, and had, therefore, given to itself, as shipper, an undue and unreasonable advantage and preference over other shippers.

In the view I have taken of the case, I have not thought it material to dispute the conclusion of the Circuit Court, sustaining the contention of the defendants, that in the contract of December 3, 1896, the words "railway company" (meaning the Chesapeake and Ohio Company), in the clause, "and said *railway company* has the right to terminate this contract at any time if said bituminous coal be of poor quality, or if its delivery be unnecessarily delayed," were intended for, and should be read as, "railroad company" (meaning the New York, New Haven and Hartford Company); and that similarly, the words "railway company" (meaning the Chesapeake and Ohio Company), in the provision, "said *railway company* has the right to cancel any and all portions of said quantity of bituminous coal remaining undelivered on July 18, 1902," were intended for, and should be read as, "railroad company" (meaning the New York, New Haven and Hartford Company).

If the preceding argument has accomplished its object it has established that in the course of dealing

between the Chesapeake and Ohio Company and the New York, New Haven and Hartford Company described in the petition the first-named company has transported coal at less than its published tariff. When such is shown to be the case the third section of the act of February 19, 1903, the so-called Elkins Act, directs that the court having jurisdiction "shall enforce an observance of the published tariffs." It is therefore submitted that, in addition to enjoining the further carrying out of the particular contract and transactions thereunder between the two defendant companies, this court should direct the Circuit Court for the Western District of Virginia, agreeably to the mandate of the said third section of the act of February 19, 1903, to enter a decree commanding the Chesapeake and Ohio Company to observe in the future the published tariffs which it had been departing from, namely, its tariffs on bituminous coal from the mines in West Virginia to tidewater.

W. A. DAY,
Of Counsel.

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Clerk.

In the Supreme Court of the United States.

OCTOBER TERM, 1905.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, appellant,
v.
THE INTERSTATE COMMERCE COMMISSION.
No. 24.

THE INTERSTATE COMMERCE COMMISSION, appellant,
v.
THE CHESAPEAKE AND OHIO RAILWAY COMPANY and The New York, New Haven and Hartford Railroad Company.
No. 27.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF VIRGINIA.

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APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF VIRGINIA.

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION.

STATEMENT.

This is a proceeding instituted July 13, 1903, by the Interstate Commerce Commission under the so-called Elkins Act (32 Stat., c. 708, p. 847), pertinent parts of which follow.

> SEC. 1. * * * The wilful failure upon the part of any carrier subject to said acts to file and publish the tariffs or rates and charges as

required by said acts or strictly to observe such tariffs until changed according to law, shall be a misdemeanor, and upon conviction thereof the corporation offending shall be subject to a fine of not less than one thousand dollars nor more than twenty thousand dollars for each offense; and it shall be unlawful for any person, persons, or corporation to offer, grant, or give or to solicit, accept, or receive any rebate, concession, or discrimination in respect of the transportation of any property in interstate or foreign commerce by any common carrier subject to said act to regulate commerce and the acts amendatory thereto whereby any such property shall, by any device whatever, be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said act to regulate commerce and the acts amendatory thereto, or whereby any other advantage is given or discrimination is practiced. Every person or corporation who shall offer, grant, or give or solicit, accept or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than one thousand dollars nor more than twenty thousand dollars. * * *

Whenever any carrier files with the Interstate Commerce Commission or publishes a particular rate under the provisions of the act to regulate commerce, or acts amendatory thereto, or participates in any rate so filed or published, that rate as against such carrier, its officers, or agents in any prosecution begun under this act shall

be conclusively deemed to be the legal rate, and any departure from such rate, or any offer to depart therefrom, shall be deemed to be an offense under this section of this act.

SEC. 3. That whenever the Interstate Commerce Commission shall have reasonable ground for belief that any common carrier is engaged in the carriage of passengers or freight traffic between given points at less than the published rates on file, or is committing any discriminations forbidden by law, a petition may be presented alleging such facts to the Circuit Court of the United States sitting in equity having jurisdiction; and when the act complained of is alleged to have been committed or as being committed in part in more than one judicial district or State, it may be dealt with, inquired of, tried, and determined in either such judicial district or State, whereupon it shall be the duty of the court summarily to inquire into the circumstances, upon such notice and in such manner as the court shall direct and without the formal pleadings and proceedings applicable to ordinary suits in equity, and to make such other persons or corporations parties thereto as the court may deem necessary, and upon being satisfied of the truth of the allegations of said petition said court shall enforce an observance of the published tariffs or direct and require a discontinuance of such discrimination by proper orders, writs, and process, which said orders, writs, and process may be enforceable as well against the parties interested in the traffic as against the carrier, subject to the right of appeal as now provided by law.

The petition (R., 1-6)—

The Chesapeake and Ohio Railway Company is engaged in carrying freight at less than its published rates and in committing discrimination forbidden by law. In the spring of 1903 said railway company made a contract to carry 60,000 tons of coal from West Virginia to tide water at Newport News, Va., for shipment to the New York, New Haven and Hartford Railroad Company, for carrying which the freight realized would not exceed 60 cents per ton and much less than the published rate of $1.45 per ton. The Chesapeake and Ohio Railway Company is now engaged in carrying out that agreement and has delivered at least 25,000 tons, for which it has realized much less than the published rate.

The railway company undertakes to justify its action upon the ground that in 1896 it made a contract with the New York, etc., Railroad Company, agreeing to deliver 2,000,000 tons of coal prior to July 1, 1902, monthly as called for, not to exceed 400,000 tons per annum, at the fixed price of $2.75 per ton, New Haven basis. At the expiration of the time specified 60,000 tons of the coal had not been delivered. The petitioner charges that this contract of 1896 was illegal and void, being *ultra vires* and in conflict with the interstate-commerce act.

During the winter of 1902–3 the New York, etc., Railroad Company presented a claim against the railway company for more than $100,000 as damages for breach of contract, and thereafter it was arranged be-

tween them that if the Chesapeake and Ohio Railway would cause to be delivered 60,000 tons of coal at $2.75, the original price, the claim against it would be discharged. In pursuance of this agreement arrangement was made with certain dealers in the Kanawha district of West Virginia to ship that amount of coal to the railroad company prior to July 31, 1903, the railway company bearing the loss from regular rates.

In 1903 the published freight rate of the Chesapeake and Ohio Railway from the Kanawha district to Newport News was $1.45 per ton. The necessary cost of delivering coal from that district, exclusive of railway freights, laid down at New Haven, was as follows: Price of coal at mines, $1.28; ocean rates, about $1; discharging, $0.19; total, $2.47. The railway company, therefore, would receive for freight about 28 cents per ton, or $1.17 less than its published rate.

The petition finally charges that the Chesapeake and Ohio Railway is engaged in carrying freight at less than published rate and discriminating against other coal produced in the Kanawha district; that the New York, etc., Railroad Company receives a rebate or concession upon the traffic carried for it, and that both roads are acting in violation of law. It prays that the Chesapeake and Ohio Railway Company be required to observe its published tariffs; that the New York, New Haven and Hartford Railroad Company be enjoined from accepting or receiving any rebate or concession, and that "the Chesapeake and Ohio Railway Company be enjoined and restrained

from doing anything whatever whereby coal or any other property shall, by any device whatever, be transported by it at a less rate than that named in the tariffs published and filed by such carrier."

The answers—

The Chesapeake and Ohio Railway Company (R., 44–50), admitting that it is engaged in freight traffic between points in West Virginia and Newport News, Va., specifically denies that it made a contract in 1903 to carry coal in violation of its published tariffs. It says that on December 3, 1896, it entered into a written contract with the New York, etc., Railroad Company whereby it agreed to sell and deliver the latter 2,000,000 tons of coal between July 1, 1897, and July 1, 1902, at $2.75 per ton, New Haven basis, and that notwithstanding the allegation of the petition that this contract was illegal and void, it denies such invalidity is an interstate-commerce question or proper subject for adjudication in this proceeding. Large deliveries were made under the contract of 1896 and it would have been carried out but for a miners' strike. On July 1, 1902, there was an undelivered shortage of 59,966 tons. In January, 1903, the railroad company rendered a damage claim for $103,910.69, the obligation of which the railway company recognized, and desiring in good faith to discharge the same agreed verbally to deliver 59,966 tons of Kanawha coal at the original price, and in this way liquidate the claim presented against it. Thereupon arrangement was made with certain coal dealers in the Kanawha district

to deliver the specified amount of coal, the railway company to make good to them the difference between the agreed price of $2.75 and the actual cost. By this arrangement the railway company paid a damage claim against it for more than a hundred thousand dollars, which amount should be taken into account in any just estimate of the consideration to be received and paid for the coal. The arrangement involved no illegal advantage to either of the respondents and imposed no injury upon any shipper.

During the spring and summer of 1903 the price of coal at the mines was $1.28 per ton, the freight rate from the Kanawha district to Newport News $1.45, ocean rate (average) $0.885, and the cost of discharging $0.19, making a total of $3.805—$1.055 more than the agreed price $2.75 per ton at New Haven.

The New York, etc., Railroad Company (R., 58–64) denies that it has ever been a shipper of coal over the Chesapeake and Ohio Railway, or that, so far as it is concerned, any discrimination of rates has been made. It requires for its operations a large amount of coal, and in December, 1896, entered into a written contract with the Chesapeake and Ohio Railway by which the latter agreed to sell and deliver to it 2,000,000 tons of bituminous coal in such quantities monthly as wanted between July 1, 1897 and July 1, 1902, in bins at ports upon its lines, at $2.75 per gross ton. Respondent had no knowledge of the price the Chesapeake and Ohio Railway expected to pay for the coal or the tariff rates thereupon.

During the winter of 1900–1901 the Chesapeake and Ohio Railway, by reason of strikes, failed to deliver as provided by contract, whereby a legal claim for damages arose against it amounting to $160,000, which was discharged by paying $130,000.

Early in the year 1902 a general strike of miners restricted the supply of coal and enhanced the price, rendering it impossible for the Chesapeake and Ohio Railway to supply the amount called for. On July 1, 1902, the shortage amounted to 59,966 tons, which amount the respondent was required to purchase in other markets at an increased cost of $103,910.69, for which sum it rendered a valid account against the railway company. In lieu of payment the respondent agreed to receive the amount of coal in arrears under the original contract, and the Chesapeake and Ohio Railway immediately entered upon the performance of the last agreement, and at the time of filing the original complaint had delivered more than 33,000 tons.

The Chesapeake and Ohio Railway is authorized by law to contract for and sell coal. The contract in this case was made in the State of New York, to be performed in the States of Connecticut, Rhode Island, and Massachusetts.

The proof–

From July 1, 1897, to July 1, 1902, and from April, 1903, to the date the petition was filed, the Chesapeake and Ohio Railway charged and collected its full tariff rates on coal other than that shipped to the New York, New Haven and Hartford Railroad Company from the

New River and Kanawha districts to Newport News for shipment beyond the Capes. The charter of the Chesapeake and Ohio Railway Company does not and did not, in express terms, permit it to buy and sell articles of transportation (R., 66).

A copy of the agreement of 1896 between the respondent railroads follows. The original was executed upon an ordinary printed form, the blanks being filled in with typewritten matter indicated herein by italics. (R., 67, 190.)

> Contract made between the *Chesapeake and Ohio R'y Co.*, of ———, and The New York, New Haven and Hartford Railroad Company.
>
> Said *Chesapeake and Ohio Railway Co.*, for the consideration hereinafter mentioned, hereby agrees to furnish *to* said railroad company *not to exceed two million gross tons of bituminous coal from its line in such quantities monthly as wanted from July 1, 1897, to July 1, 1902, without charge for demurrage. Deliveries to be made not exceeding four hundred thousand tons per annum.*
>
> And said *Chesapeake and Ohio Railway Company* further agrees that all said *bituminous coal* shall be of the best quality, first-class in every respect, and satisfactory to said railroad company, *and said railway company has the right to terminate this contract at any time if said bituminous coal be of poor quality, or if its delivery be unnecessarily delayed.*
>
> And said *Chesapeake and Ohio Railway Company* further agrees to deliver all said *bituminous coal* to said railroad company *in its bins at*

such ports upon its line as required by the monthly requisitions of its purchasing agent.

In consideration of the faithful performance by the said *Chesapeake and Ohio R'y Co.* of all its agreements herein contained, said railroad company agrees to pay for said *bituminous coal* at the rate of *two and seventy-five one-hundredths dollars per gross ton New Haven basis*, settlement to be made *monthly.*

Said Railway Co. has the right to cancel any and all portions of said quantity of bituminous coal remaining undelivered on July 1, 1902.

Witness the names of the parties hereto this the *third* day of *Dec., 1896.*

(Signed) CHESAPEAKE AND OHIO RY. CO.,
By M. E. INGALLS.

(Signed) THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,
By C. S. MELLEN,
Second Vice-President.

For value received, I hereby guarantee that the Chesapeake and Ohio R'y Co. shall not fail to deliver coal on account of strikes.

J. PIERPONT MORGAN.

D. H. Matson (R., 145), a coal broker for many years, testified that he was familiar with the course of business in making contracts for the sale of coal and that "'Any portion of this tonnage not shipped by ———, on which date this contract will expire, shall be canceled,' or a clause permitting the seller to cancel all coal not delivered within the period provided for by the contract upon certain conditions, has been and is the usual course of business among dealers in coal."

Coal is carried from the West Virginia fields by the Chesapeake and Ohio Railway to tidewater at Newport News, Va., and thence by ocean vessels to New England.

There is conflict in the testimony concerning published rates on through shipments of coal by railroad and water from West Virginia to New Haven prior to March 13, 1899. The respondents claim (R., 178) that the through rate per ton, including railroad carriage to Newport News and ocean carriage to New England points from April 15, 1895, to and including January 1, 1899, was $2.25, and from January 3, 1899, to March 8, 1899, $1.75. The Commission claims that prior to March 8, 1899, the Chesapeake and Ohio Railway published no through tariff rate for coal between West Virginia districts and New Haven; that from October 1, 1895, to January 2, 1899, the rate to Newport News was $2 per ton, and to New Haven $2 per ton, plus the ocean rate from Newport News; that between January 3, 1899, and March 8, 1899, the rate from the New River district to Newport News was $1.55, and to New Haven that sum plus the ocean rate. (See deposition of Smith, R., pp. 145–6–7–8.)

All parties agree as to rates from the New River and Kanawha districts to Newport News subsequent to March 8, 1899—no through rate to New Haven is claimed. They are set out in the record at page 179 and vary from 80 cents to $1.45 per ton. The latter rate took effect April 1, 1903.

The cost of ocean carriage and lighterage on the coal delivered in May, June, and July, 1903, was approximately per ton 90 cents; discharging, 23 cents; insurance, 1 cent; total, $1.14. (R. 76.)

On December 11, 1896, J. W. Hopkins (R., 69, 114–172), acting for the Chesapeake and Ohio Railway Company, entered into agreement with certain operators in the New River district, West Virginia, for the purchase of 400,000 tons of coal annually commencing June 1, 1897, and ending July 1, 1902, at $0.70 per ton. This provided for an increased price in case of an advance in cost of mining and specified that "the deliveries of coal under this contract are for business outside of any present delivery made over the line of the Chesapeake and Ohio road and not obtainable at existing prices." It further provided: "The existing charge of 75 cents per car made by the Chesapeake and Ohio Railway Company for delivery of cars to their main line is to be abolished on coal delivered under this contract." "In order to develop the mines sufficiently to produce the requisite 400,000 tons per annum required under this contract agreement is made to take, commencing with the execution of this contract, all coal possible and as regularly as may be," etc. (R., 70.)

During the spring of 1903 the Chesapeake and Ohio Railway agreed with the New York, etc., Railroad to deliver about 60,000 tons of coal, the amount in arrears under the original contract of 1896 (R., 13). Arrangements were then made with certain dealers in

the Kanawha district, who undertook to make the deliveries and collect the amount per ton originally stipulated, the railway company to stand any loss. J. R. Thomas, one of the parties, says in reference to this arrangement (R., 126):

> About the middle of April, 1903, a verbal arrangement was made between said affiant, C. J. Wittenberg, president of the C. & O. Coal and Coke Co., and Geo. W. Stevens, president of the Chesapeake and Ohio Railway Company, whereby 60,000 tons of run-of-mine Kanawha coal should be delivered to the New York, New Haven and Hartford Railroad Company to finish out the amount of the coal undelivered upon said contract; that the price at which said coal was to be delivered by said Kanawha Fuel Company was $1.15 per net ton, or $1.28 per gross ton; that said Wittenberg's company, which was then acting as the eastern or tide water agent of said Kanawha Fuel Company, was to handle the movement of said coal beyond the Capes, making deliveries to the New York, New Haven and Hartford Railroad Company, and making settlements with the Chesapeake and Ohio Railway Company and the Kanawha Fuel Company, respectively.

December 31, 1897, the Atlantic Transportation Company agreed with the Chesapeake and Ohio Railway (R., 72) to transport coal from Newport News to New Haven at 50 cents per ton, and to other points at a proportionate rate. This was not carried out.

A statute of West Virginia passed February 15, 1895 (R., 169), makes it unlawful for any railroad

company to engage in the business of buying and selling coal.

A statement of deliveries to the New York, New Haven and Hartford Railroad Company under writing of 1896, in the record, page 76, shows the average price received therefor (approximately $2.84 per ton), cost of the coal, ocean freight, discharging, and insurance. (The price varies according to the port at which it was delivered—New Haven being the basis.) From this it appears the net results to the railway for more than eighteen months subsequent to July 1, 1897, were less than the published tariff charges as claimed by it and that, with the exception of a few months during 1899, the same thing was true up to July 1, 1902.

The original act incorporating the Chesapeake and Ohio Railway Company passed March 10, 1867, is chapter 280, Acts of the Assembly of Virginia, 1866–1867, page 705.

A preliminary injunction restrained the Chesapeake and Ohio Railway from acting under the agreement with the New York, etc., Railroad, and from carrying coal or any other traffic at a rate different from the schedules on file with the Interstate Commerce Commission. (R., 41.)

On the final hearing the court below held the contract of 1896 illegal, and action under it in violation of section 3, interstate commerce act, because other coal shipped beyond the capes was prejudiced thereby; that the claim of the New York, etc., Railroad arising

out of the alleged breach of that contract was unenforceable, and that the agreement of 1903 was invalid because in violation of section 3 of the interstate commerce act. The railroad companies were enjoined from paying or receiving anything on account of the alleged violation of the 1896 contract and from carrying into effect the agreement of 1903.

The court refused, upon application of the Commission, to enlarge the injunction by perpetually enjoining the Chesapeake and Ohio Railway from transporting coal for anyone at less than its established rates.

The Commission has appealed, and complains because the court failed to enlarge the injunction as requested.

The New York, etc., Railroad Company has likewise appealed, and complains of the final decree adjudging the rights of the parties.

ARGUMENT.

I.

The Interstate Commerce Commission complains because the final injunction granted below is too narrow, in that it fails to restrain defendant Chesapeake and Ohio Railway Company "from transporting coal for anyone at less than its established rates."

Section 3 of the Elkins Act provides that when a petition has been filed by the Commission alleging failure to observe published rates or discrimination, "upon being satisfied of the truth of the allegations of said petition said court shall enforce an observance of

the published tariffs or direct and require a discontinuance of such discrimination by proper orders, writs, and process, which said orders, writs, and process may be enforceable as well against the parties interested in the traffic as against the carrier," etc.

It is important to know how broad injunctions issued in proceedings under this act should be, and to secure an authoritative ruling the question is here presented.

The interstate commerce act was intended to cut up by the roots the entire system of rebates and discriminations and to put all shippers on an absolute equality. (*U. P. Railway Co.* v. *Goodridge*, 149 U. S., 680, 690.)

The Elkins Act was intended to strengthen the former statutes and to give the courts power to enforce them. It should, of course, be interpreted with that end in view. If when a railroad is detected in willfully violating the law by transporting any article at less than schedule rates the only remedy in equity is to restrain it from thereafter so carrying that article for that person, little may be accomplished. But if under the circumstances suggested a broad order forbidding transportation of the article for anybody must be issued, the results may be much more wholesome, and the true purpose of the law may be more fully effectuated.

In the case of *In Re Debs* (158 U. S., 564, 570), an injunction issued "commanding the defendants and all persons combining and conspiring with them, and all other persons whomsoever, absolutely to desist and

refrain from in any way or manner interfering with, hindering, obstructing, or stopping any of the business of any of the following named railroads, etc."

Debs violated the order and was punished for contempt. If strikers may properly be restrained by such a sweeping injunction, why may not a railroad be enjoined from carrying coal for anybody below published rates?

The statute provides the "court shall enforce an observance of the published tariffs." Unless the road can be enjoined from violating such tariffs as to all persons how can such observance practically be enforced?

I submit whenever in a proper proceeding the court is satisfied that a defendant road has been engaged in carrying traffic at less than published rates on file its duty under the statute is to "enforce observance of the published tariffs" by an injunction prohibiting any action not in accordance with these tariffs.

In *Swift & Co.* v. *United States* (196 U. S., 375, 396, 401) the court said: "We equally are bound by the first principles of justice not to sanction a decree so vague as to put the whole conduct of the defendants' business at the peril of a summons for contempt. We can not issue a general injunction against all possible breaches of the law;" and in accordance with the principle so announced modified the decree below which granted a "sweeping injunction to obey the law."

The proceeding against Swift & Co. was not under the Elkins Act; and, moreover, to require a railroad to

observe the plain terms of its own tariff schedules is a very different thing from a "sweeping injunction to obey the law."

II.

Respondents assert that in 1903 the New York, etc., Railroad Company had a claim against the Chesapeake and Ohio Railway, recognized by the latter as valid, and which can not be questioned here, for the sum of $103,000, and that for the purpose of discharging such indebtedness the railway agreed to deliver (about) 60,000 tons of coal and receive therefor in money $2.75 per ton. They maintain, in effect, that the carrying road was to receive not only the $2.75 per ton, but in addition liquidate the demand against it, and in this way secure a handsome profit above published rates.

The relation of the Chesapeake and Ohio Railway to the coal furnished by Kanawha operators under agreements of 1903 is not entirely clear. Whether in legal effect it bought, owned, and then delivered the coal or whether it employed or induced the operators to deliver the same at New Haven by guaranteeing them a certain net return may be subject to question. In either view, under conditions then prevailing, beyond reasonable doubt; the arrangement constituted an unlawful device for transporting coal at less than published tariff rates and to give an advantage and discriminate, unless the discharge and settlement of the $103,000 claim must be considered part of the compensation.

The Kanawha contractors received for each ton of coal $1.28. The cost of ocean carriage, discharge, and insurance, as shown by the result of actual shipments (R., 76), amounted to $1.14—total, $2.42. The railroad paid $2.75 per ton, leaving of the cash paid only 33 cents for railway carriage, whereas the published rate was $1.45.

I submit—

That the validity and effect of the written agreement of 1896 and transactions in pursuance thereof are proper subjects for inquiry in this proceeding—

That no legal liability for damages against the Chesapeake and Ohio Railway arose out of that agreement, or anything alleged to have been done in pursuance thereof--

And, finally, that if the Chesapeake and Ohio Railway Company was liable for the claim of $103,000 it could not lawfully discharge the same in the way adopted and being pursued in 1903, when the original petition was filed.

III.

Respondents set up the 1896 agreement and transactions under it to justify what otherwise would be manifestly illegal. They say since the Chesapeake and Ohio Railway has admitted the alleged liability the legality of the same can not be questioned in this proceeding.

No extended argument is required to show that a railroad can not avoid the statutes to regulate commerce

or escape its public duties by simply admitting a liability which has no foundation in law. Interstate-commerce acts were passed because the public was not willing to permit the railroads to do as they pleased. The public is vitally interested that no common carrier should admit a baseless liability, for in the last analysis the public will probably have to pay it. A defense bottomed on the recognition of a liability springing from a void contract would be clearly without merit.

In *Union Pacific Railway Co.* v. *Goodridge* (149 U. S., 680, 691)—a proceeding under a provision of the Colorado statute in substantial accord with the interstate-commerce act—the railway company, to justify allowance of rebates, relied on an unliquidated claim for damages against it held by the consignee, and counsel contended "If, in the honest judgment of the officers of the defendant company who made the contract, the considerations which entered into it and upon which alone it was made were sufficient to warrant the company to pay back to the Marshall Company 40 cents per ton for each ton it shipped for five years, that is enough."

Here respondents declare recognition of the claim against it by the Chesapeake and Ohio Railway is conclusive and precludes inquiry in this proceeding concerning the validity of the same.

This court emphatically repudiated the doctrine advocated for the railway company in *Union Pacific Railway Co.* v. *Goodridge*, and undertook to inquire for itself

into the nature and effect of the alleged obligation. Mr. Justice Brown, speaking for the court, declared (p. 690):

> While we do not undertake to say that a railroad company may not justify a fixed rebate in favor of a particular shipper by showing a liquidated indebtedness to such shipper, which the allowance of the rebate was intended to settle, it would practically emasculate the law of its most healthful feature to permit an unexplained, indefinite, and unadjusted claim for damages arising from a tort, which, though litigated for some time, never seems to have been prosecuted to a final determination in the courts, to be put forward as an excuse for a clear discrimination in rates. This act was intended to apply to intrastate traffic the same wholesome rules and regulations which Congress two years thereafter applied to commerce between the States, and to cut up by the roots the entire system of rebates and discriminations in favor of particular localities, special enterprises, or favored corporations, and to put all shippers on an absolute equality. * * * (P. 691.) To hold a defense thus pleaded to be valid would open the door to the grossest frauds upon the law and practically enable the railroad company to avail itself of any consideration for a rebate which it considers sufficient, and to agree with the favored customer upon some fabricated claim for damages, which it would be difficult, if not impossible, to disprove. For instance, under the defense made by this company, there is nothing to prevent a cus-

tomer of the road, who has received a personal injury, from making a claim against the road for any amount he chooses, and in consideration thereof, and of shipping all his goods by that road, receiving a rebate for all the goods he may ship over the road for an indefinite time in the future. It is almost needless to say that such a contract could not be supported.

IV.

(a)

The agreement of 1896 was at most a gratuitous option or offer by the Chesapeake and Ohio Railway to sell and deliver coal, given with the evident hope of getting business, and subject to revocation at any time before acceptance. The New York, etc., Railroad was at perfect liberty to call or not to call for any amount of coal within the specified limits; it could reject any not satisfactory, and had nothing to gain by "canceling" or "terminating" the contract, but on the contrary might greatly profit by enforcing the same. Conditions then easy to foresee as possible might make cancellation or termination of the contract most important to the Chesapeake and Ohio Railway, and in a gratuitous offer prudence demanded a reservation of the right to take such action.

The contract distinctly provides "said railway company has the right to cancel any and all portions of said quantity of bituminous coal remaining undelivered on July 1, 1902" (R., 68). This was no unusual provision in coal contracts (R., 145).

The claim in question arose because a portion of said quantity of coal remained undelivered July 1, 1902, and as the railway company had a right to cancel such portion, no liability for breach of contract arose.

(b)

It was *ultra vires* of the Chesapeake and Ohio Railway to contract with the New York, etc., Railroad to sell and deliver coal. The railway owned no coal and its charter gave it no right to carry on the business of dealing in such merchandise. (R., 66.)

"All doubts with regard to the authority granted in a corporate charter are to be resolved against the corporation." (*Louisville and Nashville Railroad Co.* v. *Kentucky*, 161 U. S., 677, 685.)

Railroad corporations possess the powers which are expressly conferred by their charters, together with such powers as are fairly incidental thereto. The general rule is that a contract made by a corporation beyond the scope of its powers, express or implied, on a proper construction of its charter, can not be enforced or rendered enforceable by the application of the doctrine of estoppel. (*Union Pacific Railway Company* v. *Chicago, etc., Railway Co.*, 163 U. S., 564, 581.)

"The charter of a corporation * * * is the measure of its powers, and the enumeration of those powers implies the exclusion of all others not fairly incidental. All contracts made by a corporation beyond the scope of those powers are unlawful and void, and no action can be maintained upon them in the

Section 6, Interstate Commerce Act, makes it a misdemeanor for a carrier to charge, demand, collect, or receive greater or less compensation than published rates for transportation of property, or for any service in connection therewith.

The duty of the Chesapeake and Ohio Railway Company accordingly—for performing which no liability for damages could arise—was to decline to deliver coal under the contract of 1896 unless a different course was legitimate because the necessary loss could be properly treated as incident to its operations as dealer as distinguished from those of carrier.

This brings us to consideration of the broad question: Can a railroad, when interstate transportation is involved, make a contract for future delivery at a fixed price of something not owned by it, which must be fulfilled although that price becomes insufficient to meet cost of merchandise plus schedule freight?

The duty of a common carrier is to transport at reasonable rates without preference or discrimination, to advise the public accurately concerning rates, and to give equality of treatment to all shippers. The interstate-commerce act enjoins strict performance of this duty, and should be so construed as to prohibit whatever directly conflicts therewith. The public is not less damnified when a carrier sustains loss upon a contract for delivery of coal because the same is charged to merchandise rather than to the freight account; and it appears absurd to say a railroad may

render the selfsame transaction legal or illegal by the way it keeps books.

Transportation is the railroad's business and from that source its earnings come. Other permissible transactions must be regarded as incidental and intended to enable it to earn freight. If loss occurs where an article has been both purchased and transported the natural course would be to charge it to freight, for, in a broad sense, transportation is the only thing really contributed by the carrier.

Suppose a railroad in good faith, coal being 50 cents per ton and the freight rate 50 cents, should contract to deliver a great quantity as called for during the succeeding five years at $1; and then suppose during that time coal should advance to $1 per ton and the freight rate to $1.25. Under such conditions, when the entire gross receipts would not equal the schedule rate, could the carrier say it had received full freight charges and that the loss was on the merchandise? Such a construction of the statute would tend to destroy its usefulness and open the door to no end of fraud.

This point is elaborated and forcefully discussed in the accompanying scholarly brief by Mr. W. A. Day.

The deleterious effect of permitting railroads to act as dealers in merchandise is lucidly pointed out by the Vice-Chancellor in *The Attorney-General* v. *The Great Northern Railway Company* (1860), 38 Law Journal (Eng.), page 794 (New Series, vol. 29); and by Cockburn, C. J., in *Baxendale* v. *Great Western Ry. Co.*, 28

L. J. C. P., 81—5 C. B. (n. s.), 336. The general subject is discussed in the authorities below:

Haddock v. *Delaware, Lackawanna & Western Railway Company*, opinion by Cooley, chairman, 4 Interstate Commerce Commission Reports, 296.

Coxe Bros. & Co. v. *Lehigh Valley Railroad Co.*, 4 Interstate Commerce Commission Reports, 535.

Grain Rate Case, 7 Interstate Commerce Commission Reports, 33.

Wood on Railroads, vol. 1, Minor's ed., 652, and cases cited.

Baxendale v. *North Devon Ry. Co.*, 3 C. B. (n. s.), 324.

V.

If the claim presented by the New York, etc., Railroad was an indefinite and unadjusted one for damages *Union Pacific Railway* v. *Goodridge* (*supra*), seems conclusive against the contention that it can be treated as part of the consideration for carriage.

If the claim for $103,000 was a definite, fixed, and adjusted one, then I submit it must be treated, if taken into consideration at all, just as though it were money paid the carrier.

The published rate of the Chesapeake and Ohio Railway after April, 1903, on coal carried to Newport News for shipment beyond the Capes was $1.45 per ton. The figures already quoted show that of the contract price there was left after paying for the coal and ocean transportation about 33 cents per ton. Sixty thousand tons

were to be carried, and in addition to the 33 cents per ton the carrier expected, respondents allege, to receive for the whole service $103,000, or, say, $1.70+ per ton, making total freight $2.03 per ton—very much more than the schedule.

Section 6, interstate-commerce act, prohibits charging or receiving more for transportation of property or for any service in connection therewith than is specified in the published schedule. Section 3 of the Elkins Act permits an injunction whenever a carrier is engaged in "committing any discrimination forbidden by law."

I submit that any device or arrangement according to which a carrier is receiving more for transporting freight than the published schedule constitutes a discrimination forbidden by law within the meaning of the act. And I further submit that, without reference to the Elkins Act, under the broad powers of a court of equity an injunction may issue forbidding such a device or practice.

I respectfully ask that the injunction granted by the court below be enlarged and the final decree, with that modification, be affirmed.

J. C. McREYNOLDS,
Assistant Attorney-General.

OCTOBER, 1905.

○

Supreme Court of the United States.

Nos. 24 and 27.—October Term, 1905.

24	New York, New Haven and Hartford Railroad Company, Appellant, *vs.* The Interstate Commerce Commission.	Appeals from the Circuit Court of the United States for the Western District of Virginia.
27	The Interstate Commerce Commission, Appellant, *vs.* The Chesapeake and Ohio Railway Company, and The New York, New Haven and Hartford Railroad Company.	

[February 19, 1906.]

Mr. Justice White delivered the opinion of the Court.

Following an inquiry, begun in consequence of a complaint to it made, the Interstate Commerce Commission, through the Attorney General of the United States, filed under the act to further regulate commerce, (32 Stat. 847,) in the Circuit Court of the United States for the Western District of Virginia, this proceeding against the Chesapeake and Ohio Railway Company, a Virginia corporation, and the New York, New Haven and Hartford Railroad Company, a corporation of the State of Connecticut. In this opinion we shall hereafter respectively speak of the parties as the Commission, the Chesapeake and Ohio, and the New Haven. The petition averred that the Chesapeake and Ohio was engaged in the carriage of coal as interstate traffic between the Kanawha district of West Virginia and Newport News, Virginia, for delivery thence to the New Haven, in Connecticut, and charged that the traffic was being moved at less than the published rates, and in such a way as to produce a discrimination in favor of the New Haven road and against others, all in violation of the act to regulate commerce and the amendments thereto. Specifying the grounds of the complaint, it was alleged that in the spring of ~~1903~~ the Chesapeake and Ohio made a verbal agreement with the New Haven to sell to that road sixty thousand tons of coal, to be carried from the Kanawha district to Newport News, and thence by water to Connecticut, for delivery to the buyer at $2.75 per ton, and that a considerable portion had already been delivered and the remainder was in process of delivery. It was averred that the price of the coal at the mines where the Chesapeake and

1903

courts, and this upon three distinct grounds: The obligation of every one contracting with a corporation, to take notice of the legal limits of its powers; the interest of the stockholders, not to be subjected to risks which they have never undertaken; and, above all, the interest of the public, that the corporation shall not transcend the powers conferred upon it by law." (*Central Transportation Co.* v. *Pullman Palace Car Co.*, 139 U. S., 24, 48.)

When the statutes of a State creating or licensing a railroad corporation are deemed public and judicially noticed by the courts of that State, the Federal courts sitting therein and the Supreme Court on appeal will also take judicial notice of them. (*Martin's Administrator* v. *Baltimore and Ohio Railroad Co.*, 151 U. S., 673, 678.)

Acts incorporating and licensing railroads are public, and the courts of Virginia and West Virginia take judicial notice of them.

Baltimore, etc., Railroad Co. v. *Sherman*, 30 Gratt. (Va.), 602.

Norfolk, etc., Railroad Co. v. *Harman*, 83 Va., 553.

Hart v. *Baltimore, etc., Railroad Co.*, 6 W. Va., 336.

State v. *Baltimore, etc., Railroad Co.*, 15 W. Va., 362.

Douglass v. *Kanawha, etc., Railroad Co.*, 44 W. Va., 267.

Am. and Eng. Enc. of Law, vol. 17, 942.

The Chesapeake and Ohio Railway Company was incorporated by an act of the general assembly of the State of Virginia passed March 1, 1867. (Acts of Virginia Assembly, 1866–1867, c. 280, p. 705.)

(c)

[Insert bottom page 25.]

Section 3, interstate commerce act, declares it unlawful for a carrier to make or give any undue or unreasonable preference or advantage, or to subject any person or traffic to undue or unreasonable prejudice or disadvantage in any respect.

The purchases in the market and deliveries of coal by the Chesapeake and Ohio Railway to the New York, etc., railroad, at a price insufficient to repay purchase money and meet schedule freight rates in pursuance of a gratuitous option under which the latter could demand deliveries according to its interest alone manifestly gave the railroad a preference and advantage. As nobody else could hope to obtain coal on the terms gratuitously granted the railroad, the preference and advantage were undue and unreasonable.

Such purchases and deliveries operated to the undue prejudice and disadvantage of coal operators in West Virginia and traffic furnished by them. So long as the railway would supply a New England consumer with coal at less than market price at mines, plus cost of carriage, nobody had a fair opportunity to utilize that demand for his products. His coal was necessarily limited to other markets unless sold to the railroad at such price as it might agree to.

I submit that the gratuitous option plan resulted in most obnoxious advantages and discriminations, and that such was its purpose when originated.

courts, and this upon three distinct grounds: The obligation of every one contracting with a corporation, to take notice of the legal limits of its powers; the interest of the stockholders, not to be subjected to risks which they have never undertaken; and, above all, the inter-

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(c)

If performance of the 1896 agreement required the Chesapeake and Ohio Railway to do anything prohibited by law its duty was not to perform and no liability for damages could have arisen because of the failure.

Gulf, Colorado, &c., Ry. v. *Hefley* (1895), 158 U. S., 98, 102.

Southern Railway Co. v. *Wilcox* (1901), 99 Va., 394, 408, 409.

Fitzgerald & Co. v. *Grand Trunk Railroad Co.*, 63 Vt., 169.

Savannah, F. & W. Ry. Co. v. *Bundick* (Ga.), 21 S. E. Rep., 995.

Southern Railway Co. v. *Harrison* (Ala.) (1898), 43 L. R. A., 385.

Bullard v. *Northern Pacific Railroad Co.*, 10 Mont., 168.

Transactions under the 1896 agreement show that the net results to the carrying company were insufficient to pay freight according to published schedules. And this was true of every shipment except those made during a part of 1899, when net receipts exceeded published rates.

At no time—except a part of 1899—was it possible to buy and pay for the coal and its ocean transportation out of the contract price and have enough left to meet schedule freight charges.

tion of the contract the commodity sold, when the price stipulated in the contract does not pay the cost of purchase, the cost of delivery and the published freight rates?

The previous decisions of this court concerning the interstate commerce act do not afford much aid in determining this question. This is the case, because, although that act was adopted in 1887, and questions concerning the import of the act have been often here, such questions have not generally involved the operation and effect of the act concerning the command that published rates be adhered to, and the prohibitions against discrimination, favoritism or rebates, but have mainly concerned the meaning of the act in other respects, that is involved deciding whether powers asserted as to other subjects were vested by the act in the Interstate Commerce Commission.

There are several leading cases decided by the Commission, which are relied upon by the two railroads, directly relating to the question we have stated, but, as we shall have occasion hereafter to weigh their import, we shall not now pause to analyze and apply them.

It cannot be challenged that the great purpose of the act to regulate commerce, whilst seeking to prevent unjust and unreasonable rates, was to secure equality of rates as to all and to destroy favoritism, these last being accomplished by requiring the publication of tariffs and by prohibiting secret departures from such tariffs, and forbidding rebates, preferences and all other forms of undue discrimination. To this extent and for these purposes the statute was remedial and is, therefore, entitled to receive that interpretation which reasonably accomplishes the great public purpose which it was enacted to subserve. That a carrier engaged in interstate commerce becomes subject as to such commerce to the commands of the statute, and may not set its provisions at naught whatever otherwise may be its power when carrying on commerce not interstate in character, cannot in reason be denied. Now, in view of the positive command of the second section of the act, that no departure from the published rate shall be made, "directly or indirectly," how can it in reason be held that a carrier may take itself from out the statute in every case by simply electing to be a dealer and transport a commodity in that character? For, of course, if a carrier has a right to disregard the published rates by resorting to a particular form of dealing, it must follow that there is no obligation on the part of a carrier to adhere to the rates, because doing so is merely voluntary. The all-embracing prohibition against either directly or indirectly charging less than the published rates shows that the purpose of the statute was to make the prohibition applicable to every method of dealing by a carrier by which the forbidden result could be brought about. If the public purpose which the statute was intended to accomplish be borne in mind, its meaning becomes, if possible, clearer. What was that pur-

pose? It was to compel the carrier as a public agent to give equal treatment to all. Now if by the mere fact of purchasing and selling merchandise to be transported, a carrier is endowed with the power of disregarding the published rate, it becomes apparent that the carrier possesses the right to treat the owners of like commodities by entirely different rules. That is to say, the existence of such a, power in its essence would enable a carrier, if it chose to do so, to select the favored persons from whom he would buy and the favored persons to whom he would sell, thus giving such persons an advantage over every other, and leading to a monopolization in the hands of such persons of all the products as to which the carrier chose to deal. Indeed the inevitable result of the possession of such a right by a carrier would be to enable it, if it chose to exercise the power, to concentrate in its own hands the products which were held for shipment along its line, and to make it, therefore, the sole purchaser thereof and the sole seller at the place where the products were to be marketed; in other words, to create an absolute monopoly. To illustrate: If a carrier may by becoming a dealer buy property for transportation to a market and eliminate the cost of transportation to such market, a faculty possessed by no other owner of the commodity, it must result that the carrier would be in a position where no other person could ship the commodity on equal terms with the carrier in its capacity of dealer. No other person owning the commodity being thus able to ship on equal terms, it would result that the owners of such commodity would not be able to ship, but would be compelled to sell to the carrier. And as by the departure from the tariff rates the person to whom the carrier might elect to sell would be able to buy at a price less than any other person could sell for, it would follow that such person so selected by the carrier would have a monopoly in the market to which the goods were transported. And that the result arising from an admission of the asserted power of the carrier as a dealer to disregard the published rates conduces immediately and not merely remotely to the production of the injurious results stated, is not only demonstrated by the very nature of things, but is established to be the case by the facts indisputably shown on this record. For here it is unquestioned that the Chesapeake and Ohio, as a result of its being a dealer, had become, long prior to the adoption of the interstate commerce law and continued to be thereafter, up to the passage of the West Virginia statute prohibiting a carrier from dealing in coal, virtually the sole purchaser and seller of all the coal produced along the line of its road. That this result was not merely accidental, but was in effect engendered by the power of the carrier to deal and transport a commodity, is illustrated by the case of *The Attorney General* v. *The Great Northern Railway Company*, (29 Law Journal [N. S. Equity] 794.) In that case Vice Chancellor Kindersley was called upon to determine whether dealing in coal by the railway company was

illegal, because incompatible with its duties as a public carrier and calculated to inflict an injury upon the public. In deciding that the act of Parliament granting the charter to operate the railway implied a prohibition against the company's engaging in any other business, the reason for the rule was thus expressed (p 798):

". . . These large companies, joint stock companies generally, for whatever purpose established, and more particularly railway companies, are armed with powers of raising and possessing large sums of money—large amounts of property—and if they were to apply that money, or that property, to purposes other than those for which they were constituted, they might very much injure the interests of the public in various ways."

Illustrating the danger to the public, as established by the case before him, the Vice Chancellor said (p 792):

"Here we find this company, having the traffic from the north of England, where the great coal fields are (at least some of the principal coal fields,) supplying the country with coal, or capable of supplying it; this company buys the coal, which gives to the company an interest in checking, as much as possible, those who will not deal with them; and it is quite clear that it is possible, by the mode in which this company may (I will not say has,) but by the mode in which this company may exercise such powers as either it has or assumes to have—this company may get into their hands the traffic that is, the dealing in all the coal in the large districts supplying coal to the country. They have to a considerable extent done so, and there is no reason why it should not go on progressing. I observe that in the eight (?) years from 1852 to 1857, inclusive, the amount of their coal business has increased from 73,000 tons to 794,000 tons; and there is no reason, as the affidavits show, why they should not—there is great danger that they may—get into their hands the entire business in the coal of all that district of country. If they can do that with regard to coal, what is to prevent their doing it with every species of agricultural produce all along the line? Why should they not become purchasers of corn, of all kinds of beasts, and of sheep, and every species of agricultural produce, and become great dealers in the supply of edibles to the markets of London; and why not every other species of commodity that is produced in every part of the country from which or to which their railway runs? I do not know where it is to stop, if the argument on the part of the company is to prevail. There is, therefore, great detriment to the interests of the public, for this reason, taking merely the article of coal."

It is apparent that the construction of the statute which is now claimed by the carriers would, if adopted, not only destroy its entire remedial efficacy, but would cause the provisions of the statute to accentuate and multiply the very wrongs which it was enacted to prevent.

Without a statutory requirement as to publication of rates and the imposition of a duty to adhere to the rates as published, individual action of the shippers as between themselves and in their dealings with the carrier would have full play, and thereby every shipper would have the opportunity to procure such concessions as might result from favoritism or

other causes. Interpreting the prohibitions of the statute as it is contended they should be, it would follow that every individual would be bound by the published tariff, and the carrier alone would be free to disregard it. Thus the statute, whilst subjecting the public to the prohibitions, would exempt the carrier and would thereby enormously increase the opportunities of the latter to do the wrongs which the statute was enacted to prevent.

And the considerations previously stated serve also to demonstrate that the prohibitions of the act to regulate commerce concerning "undue or unreasonable preference or advantage," "undue or unreasonable prejudice or disadvantage" and "unjust discrimination" are in conflict with the asserted right of a carrier to become a dealer in commodities which it transports, and as such dealer to sell at a price less than the cost and the published rates. Certain also is it, when the reasons previously stated are applied to those prohibitions of the statute the possession of the power by a carrier to deal in merchandise and to sell and transport at less than published rates, would not only destroy the remedy intended to be afforded by the provisions in question, but would cause the statute to fructify the growth of the wrongs which it was intended to extirpate. In a general sense the considerations which we have previously stated, moreover, dispose of all the contentions urged at bar to establish the right of the carrier to become a dealer under the circumstances stated. Even although it may give rise to some repetition, we more particularly notice the various contentions.

(*a*) It is said that when a carrier sells an article which it has purchased and transports that article for delivery, it is both a dealer and a carrier. When, therefore, the price received for the commodity is adequate to pay the published freight rate and something over, the command of the statute as to adherence to the published rates is complied with, because the price will be imputed to the freight rate, and the loss, if any, attributed to the company in its capacity as dealer and not as a carrier. This simply asserts the proposition which we have disposed of, that a carrier possesses the power, by the form in which he deals, to render the prohibitions of the act ineffective, since it implies the right of a carrier to shut off inquiry as to the real result of a particular transaction on the published rates, and thereby to obtain the power of disregarding the prohibitions of the statute.

(*b*) It is said that, as in the case in hand, it is shown that there was no intention on the part of the carrier in making the sale of the coal to violate the prohibitions of the statute, and, on the contrary, as the proof shows an arrangement made by the carrier for transporting the coal from Newport News to Connecticut, which, if it had been carried out, would have provided for the full published rate, therefore an honest contract made by the carrier should not be stricken down because of things over which the carrier had no control. The proposition involves both an unfounded

assumption of fact and an unwarranted implication of law. It is true the court below found that the proof did not justify the inference that the Chesapeake and Ohio had, in 1896, made the contract to sell the coal to the New Haven with the purpose of avoiding a compliance with the published rates. But in this conclusion of fact we cannot agree. Whilst it may be that the proof establishes that the contract for the sale of coal was not made as a mere device for avoiding the operation of the statute, we think the proof leaves no doubt that, in making the contract in question, the Chesapeake and Ohio was wholly indifferent to and did not concern itself with the prohibitions of the statute, of which, of course, it must be assumed, to have had full knowledge. As we have seen, the president of the Chesapeake and Ohio, by whom the corporation was represented in making the contract, expressly testified that from the beginning that corporation had pursued the policy of acquiring all the coal mined on its line and sold it, relying upon the net result of such sales for its freight compensation, and that the particular contract was made in continuation of that policy. We find it impossible to conclude, from the proof, that the Chesapeake and Ohio could have made a contract for so large an amount of coal, to be delivered over so long a period, without taking into view the existing prices and the cost necessarily to be occasioned by the delivery of the coal, if the full published freight rates were to be realized. Indeed, the proof leaves no doubt upon our minds that, in making the contract, the Chesapeake and Ohio sought to accomplish results which it deemed beneficial by means which it considered effectual, even although resort to such means was prohibited by the Interstate Commerce Act. In other words, we think it is established beyond doubt that, desiring to stimulate the production of coal along its line and thereby, as it conceived, to increase the carriage of that commodity and to benefit the railroad and those living along its line by the reflex prosperity which it was deemed would arise from giving a stimulus to an industry tributary to the railroad, the Chesapeake and Ohio bought and sold the coal without reference to whether the net result to it would realize its published rates. And it would seem that this means of stimulating the industry in question was resorted to instead of attempting to bring about the same result by a lowering of the published rates, because to have so done would have engendered disparity between coal rates and the tariff on all the other articles contained in the same classification, and would besides have caused other and competing roads to make a similar reduction on the published rates, and thereby would have frustrated the very advantage to itself and those along its lines which the Chesapeake and Ohio deemed it was bringing about by the method pursued. That is to say, we think it is shown that the mode of dealing adopted was simply the result of a disregard by the Chesapeake and Ohio of the economic conceptions upon which the interstate commerce law rests, and a substitution in

their stead of the conceptions of the Chesapeake and Ohio as to what was best for itself and for the public. Further, as the prohibition of the Interstate Commerce Act is ever operative, even if the facts established that at the particular time the contract was made, considering the then cost of coal and other proper items, the net published tariff of rates would have been realized by the Chesapeake and Ohio from the contract, which is not the case, it is apparent that the deliveries under the contract came under the prohibition of the statute whenever for any cause, such as the enhanced cost of the coal at the mines, an increase in the cost of the ocean carriage, etc., the gross sum realized was not sufficient to net the Chesapeake and Ohio its published tariff of rates. This must be the case in order to give vitality to the prohibitions of the Interstate Commerce Act against the acceptance at any time by a carrier of less than its published rates. We say this because we think it obvious that such prohibitions would be rendered wholly ineffective by deciding that a carrier may avoid those prohibitions by making a contract for the sale of a commodity stipulating for the payment of a fixed price in the future, and thereby acquiring the power during the life of the contract to continue to execute it, although a violation of the act to regulate commerce might arise from doing so. Besides, all the contentions just noticed proceed upon the mistaken legal conception that the application of the statutory prohibitions depend not upon whether the effect of the acts done is to violate those prohibitions, but upon whether the carrier intended to violate the statute.

(*c*) It is urged that if the requirement of the act to regulate commerce as to the maintenance of published rates and the prohibitions of that act against undue preferences and discriminations be applied to a carrier when engaged in buying and selling a commodity which it transports, the substantial effect will be to prohibit the carrier from becoming a dealer when no such prohibition is expressed in the act to regulate commerce, and hence a prohibition will be implied which should only result from express action by Congress. Granting the premise, the deduction is unfounded. Because no express prohibition against a carrier who engages in interstate commerce becoming a dealer in commodities moving in such commerce is found in the act, it does not follow that the provisions which are expressed in that act should not be applied and be given their lawful effect. Even, therefore, if the result of applying the prohibitions as we have interpreted them will be practically to render it difficult, if not impossible, for a carrier to deal in commodities, this affords no ground for relieving us of the plain duty of enforcing the provisions of the statute as they exist. This conclusion follows, since the power of Congress to subject every carrier engaging in interstate commerce to the regulations which it has adopted is undoubted.

But it is in effect said, conceding this to be true as an original question, the prohibitions of the act ought not now to be interpreted as applying to a carrier who is a dealer in commodities, because of an adminstrative construction long since given to the act by the Interstate Commerce Commission, the body primarily charged with its enforcement, and which has become a rule of property affecting vast interests which should not be judicially departed from, especially as such construction, it is asserted, has been impliedly sanctioned by C gress by frequently amending the act without changing it in this particular.

Passing, for the present, the legal conclusion, let us first ascertain whether the premise itself is well founded. The two rulings of the Interstate Commerce Commission upon which the premise is based are *Haddock* v. *Delaware, L. & W. R. Co.*, (4 I. C. C. Rep. 296, 3 Inters. Com. Rep. 302,) and *Coxe Bros. & Co.* v. *Lehigh Valley R. R. Co.*, (4 I C. C. Rep. 535, 3 Inters. Com. Rep. 460,) decided respectively in 1890 and 1891.

Without going into detail we content ourselves with saying that in both of the cases complaints were made to the Interstate Commerce Commission concerning the defendant railroads, and it was charged that whilst acting as common carriers they were dealing in coal, and as a result violating the prohibitions of the Interstate Commerce Act as to rates and undue preferences and discriminations. It was shown in both cases that the carriers prior to the adoption of the Interstate Commerce Act were authorized by their charters or legislative authority to carry on both the business of mining and selling the coal so mined and transporting the same to market. Indeed it was found in both cases that the functions of producing and transporting as authorized were so interblended that it was impossible to separate one from the other. Whilst it is true that in both of the cases it was also shown that the carriers bought, sold and transported some coal which was not produced in the mines which they owned, this fact was evidently treated in view of the other circumstances of the case as of minor importance, since the commingled powers of producing, selling and transporting were alone made the basis of the conclusion reached by the Commission as to the character of relief which could be afforded. Solely in view of the lawful power of the carriers to mine, sell and transport existing before the passage of the act to regulate commerce the Commission decided that its authority, under that statute and under the circumstances of the case, was confined to compelling the exaction of rates which were just and reasonable. The fact that the rulings in the two cases just referred to were solely placed upon the peculiar powers of the defendant corporations possessed by them prior to the passage of the Interstate Commerce Act was pointed out by the Commission in *Grain Rates of Chicago Great Western Ry. Co.*, (7 I. C. C. Rep. 33.) In that case, in deciding that the defendant carrier was without power to purchase grain for the purpose of

securing the right to transport it, and thus evade the the law which would have applied to its transportation had it been owned by any other party, the Commission, in distinguishing the case before it from the Haddock and Coxe cases, said (p. 38):

"Those cases are in no respect similar to this. In both the common carrier was also the owner of extensive coal fields, and indeed it had become a common carrier largely for the purpose of transporting the product of those mines to market. This state of things existed before the passage of the act, and had no reference to the act. Unless the carrier was permitted to transport its coal, the result would be in effect the confiscation of its property, and to order it to charge itself with a particular rate would merely result in a matter of bookkeeping. Under these circumstances it was held that the only remedy was to enquire whether the rate charged the complainant was a reasonable one."

Now, without at all intimating that as an original question we would concur in the view expressed in the case last cited that to have applied the act to regulate commerce, under proper rules and regulations for the segregation of the business of producing, selling and transporting as presented in the Haddock and Coxe cases would have been confiscatory, and without reviewing the rulings made by the Interstate Commerce Commission in those cases and adhered to by that body during the many years which have followed those decisions, we concede that the interpretation given by the Commission in those cases to the act to regulate commerce is now binding, and as restricted to the precise conditions which were passed on in the cases referred to, must be applied to all strictly identical cases in the future, at least until Congress has legislated on the subject. We make this concession, because we think we are constrained to so do, in consequence of the familiar rule that a construction made by the body charged with the enforcement of a statute, which construction has long obtained in practical execution, and has been impliedly sanctioned by the re-enactment of the statute without alteration in the particulars construed, when not plainly erroneous, must be treated as read into the statute. Especially do we think this rule applicable to the case in hand, because of the nature and extent of the authority conferred on the Commission from the beginning concerning the prohibitions of the act as to rebates, favoritism and discrimination of all kinds, and particularly in view of the repeated declarations of the court that an exertion of power by the Commission concerning such matters was entitled to great weight and was not lightly to be interfered with. The concessions thus made, however, are wholly irrelevant to the case before us. This follows, since the Chesapeake and Ohio was, neither by its charter nor by legislative grant existing at the time of the adoption of the act to regulate commerce, possessed of the commingled attributes of carrier and producer, which was the controlling consideration in the decisions made in the Haddock and Coxe cases.

Ohio bought it and the cost of transportation from Newport News to Connecticut would aggregate $2.47 per ton, thus leaving to the Chesapeake and Ohio only about twenty-eight cents a ton for carrying the coal from the Kanawha district to Newport News, whilst the published tariff for like carriage from the same district was $1.45 per ton.

Referring to the developments before the Commission and annexing as part thereof the testimony taken on such hearing and the documents connected therewith, the petition further alleged that the Chesapeake and Ohio asserted that, although the total price which it received for the coal covered by the verbal agreement was less than the total outlay in delivering the coal, including its published rates, such fact did not amount to a departure from the published rates, and was not a discrimination for two reasons: First. Because if such difference existed, it was a loss suffered by the Chesapeake and Ohio, not from taking less than its published rates, but because it had received less as purchaser than the coal had cost. Second. That even if it had not the lawful right thus to impute the payment of the price of the coal, the Chesapeake and Ohio had, in fact, received much more for the coal than the price in money agreed on, because, at the time the verbal agreement to sell was made the New Haven had a claim exceeding one hundred thousand dollars against the Chesapeake and Ohio, arising from a previous written contract to deliver coal, which was to be extinguished by the completion of the delivery of the coal and this caused that price largely to exceed the cost of the coal to the Chesapeake and Ohio, including its published rates. Averring that the prior contract was in itself void because it also embodied an agreement to take less than the published rates and was discriminating, it was charged that the New Haven had entered into both agreements with the Chesapeake and Ohio, knowing that they were in violation of the interstate commerce law. The prayer was that the Chesapeake and Ohio and the New Haven be made parties; that both roads be enjoined, the one from further executing the verbal agreement to deliver coal and the other from seeking to enforce it; that the Chesapeake and Ohio be enjoined from "accepting or receiving any rebate, concession or discrimination in respect of the transportation of any property in interstate or foreign commerce carried by it," and be, moreover, enjoined from "doing anything whatever, whereby coal or any other property shall, by any device whatever, be transported . . . at a less rate than named in the tariffs published and filed by such carrier, as is required by the act to regulate commerce and acts amendatory thereof or supplementary thereto, or whereby any other advantage may be given or discrimination practiced." And that the New Haven road "be enjoined and restrained from accepting or receiving any rebate, concession or discrimination in respect of the transportation of any property in interstate or foreign commerce carried by it."

A preliminary restraining order was issued conforming to the prayer of the petition. The Chesapeake and Ohio by its answer admitted that it had made, in the spring of 1903, a verbal agreement with the New Haven road for about sixty thousand tons of Kanawha coal for the price alleged in the petition, to be transported by it to Newport News, and thence delivered by ocean transportation to the New Haven in Connecticut. It was admitted that the purchase price agreed to be paid was less than the market price of the coal plus the published rates, and the cost of transportation and delivery from Newport News to Connecticut, but it was averred that this was only apparently the case, because the contract to sell included the discharge of a debt of about one hundred thousand dollars, arising from the previous written contract to which the petition referred. The validity of both the previous written contract and the later verbal agreement was averred. The right of the Chesapeake and Ohio to buy and sell coal, and to impute any loss on the sale of the coal to itself as dealer instead of to itself as a carrier, was averred. Both the original contract and the one of 1903 were averred to have been made in good faith, not with any intention to avoid the published rates, and it was charged that at about the time the original contract was made arrangements had been made by the railroad for a rate of transportation from Newport News to Connecticut which would have caused the contract price to be adequate to pay the market price of the coal and all other charges, including the published rates, but that, subsequently thereto, the persons with whom this contract for transportation was made had violated their agreement, and that by strikes the price of coal had advanced, and thereby the loss of one hundred thousand dollars to the Chesapeake and Ohio was occasioned.

The New Haven road in its answer asserted its good faith in making both the original contract and the verbal agreement. It alleged that by the original contract it was a mere purchaser of coal from the Chesapeake and Ohio, and not a shipper over that road; that the coal bought was intended for its own use in the operation of its railroad; that it had no knowledge of the price which the Chesaspeake and Ohio would be obliged to pay for the coal or the sum which it would cost that road to deliver it, and therefore had no knowledge that the total cost would not equal the market price of the coal, the cost of delivery and the published rate of the Chesapeake and Ohio. It averred the validity of the agreement, the legality of the debt of one hundred thousand dollars which resulted from it, and charged that, taking that debt into consideration, the sum which it paid the Chesapeake and Ohio for the coal under the 1903 verbal agreement largely exceeded the market price and the cost of delivery, including the published rates of the Chesapeake and Ohio. It denied that there was any departure from the public rates or any discrimination, asserted that at the time the original contract was made the price was sufficient to have enabled

the Chesapeake and Ohio to perform the contract without losing anything either as a seller or as a carrier, and that if in execution of the contract a condition arose where a loss was suffered by the Chesapeake and Ohio in either capacity, it was caused by subsequent events which could not affect the validity of the contract when made, and especially denied that in any way, directly or indirectly, had it knowingly lent itself to any discrimination, or any taking by the Chesapeake and Ohio of less than its published rates.

The case was heard on the testimony taken in the proceeding before the Commission and the documents forming a part of the same, and upon further documents and testimony stipulated by counsel.

For reasons to which we shall hereafter have occasion to advert, the court held that, considering both the original contract and the verbal agreement of 1903, there was no violation of the provisions of the second and sixth sections of the act to regulate commerce, forbidding the taking of less than the published rates. It, however, held that the contracts amounted to an undue discrimination and a violation of the third section of the act. The court, hence, permanently enjoined the Chesapeake and Ohio from discharging any obligation arising from the original contract of 1896, and from further executing or attempting to execute, in any manner whatever, directly or indirectly, the verbal agreement of 1903, and it permanently enjoined the New Haven from asserting or attempting to enforce any claim arising from the contract of 1896, or in any manner, directly or indirectly, attempting to enforce the verbal agreement of 1903. Thereafter the court denied a request made by the Commission, that the injunction be expanded so as in general terms to command the Chesapeake and Ohio perpetually to observe in the future its published rates.

The ~~Chesapeake and Ohio and the~~ New Haven appealed. The Commission also prosecuted a cross appeal because of the refusal of the court to grant its prayer to make the injunction against the Chesapeake and Ohio general in its nature, and that Company in an elaborate and

It is apparent from the case as thus stated that, in order to decide the issues which arise, we may not confine our attention to the verbal agreement of 1903, the execution of which it was the immediate object of the proceeding to enjoin, but must consider the prior contract of 1896, since primarily the rights, if any, which arose under the verbal agreement, are inextricably involved in and dependent upon the contract of 1896. In other words, the controversy as considered by the Commission on the inquiry by it conducted and as decided below, and as here presented, involves an analysis of all the dealings under both contracts and the legal rights, if any, which arose from them. We must, therefore, consider the subject in this aspect, and to do so we state at once the facts which are admitted or which are indisputably established, reserving such questions of

fact as are in dispute for separate consideration when we approach the legal propositions which arise from the undisputed facts.

The Chesapeake and Ohio, chartered by the State of Virginia, operates a road which reaches both the New River and the Kanawha coal fields of West Virginia, and extends to Newport News. The New Haven, chartered by the State of Connecticut, operates a road principally situated in New England. On December 3, 1896, these two roads entered into a written contract, the one to sell and the other to buy between July 1, 1897, and July 1, 1902, not to exceed two million gross tons of bituminous coal to be taken from the line of the Chesapeake and Ohio road; deliveries to be made not exceeding four hundred thousand tons per annum. The price agreed upon was $2.75 per gross ton, New Haven basis, settlement to be made monthly. The coal was to be delivered by the seller on the line of the New Haven. The contract is reproduced in the margin.*

The Chesapeake and Ohio, not in its own name but through others who really although not ostensibly acted for it, made a contract with operators in the New River district of West Virginia, for the delivery to it of the coal to fulfill the contract which had been made with the New Haven. In consequence of failure of some of the operators to perform their part of the contract, changes were made at various times, which it is unnecessary to note. Deliveries of the coal were made to the New Haven as required up to the winter of 1900–1901, when, because of strikes and other difficulties, delivery ceased and the New Haven bought coal in the open market and presented to the Chesapeake and Ohio a bill for the increased price which it had paid, and the Chesapeake and Ohio paid one hundred and sixty thousand dollars to cover such loss. Subsequently in 1902 further strikes supervened and deliveries again ceased, at a time when about sixty thousand tons remained yet to be delivered. The New Haven again presented a bill for damages amounting to one hundred and three thousand dollars. Thereupon the verbal agreement of 1903 was made, by which it

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* Contract made between the Chesapeake and Ohio Railway Company and the New York, New Haven and Hartford Railroad Company.

Said Chesapeake and Ohio Railway Company, for the consideration hereinafter mentioned, hereby agrees to furnish to said railroad company not to exceed two million gross tons of bituminous coal from its line in such quantities monthly as wanted from July 1, 1897, to July 1, 1902, without charge for demurrage. Deliveries to be made not exceeding four hundred thousand tons per annum.

And said Chesapeake and Ohio Railway Company further agrees that all said bituminous coal shall be of the best quality, first-class in every respect, and satisfactory to said railroad company, and said railway company has the right to terminate this contract at any time if said bituminous coal be of poor quality or if its delivery be unnecessarily delayed.

And said Chesapeake and Ohio Railway Company further agrees to deliver all

was provided that the shortage of sixty thousand tons upon the original contract might be discharged by delivery on the part of the Chesapeake and Ohio of that amount of coal from the Kanawha district at the contract price of $2.75, and when this delivery was consummated it was agreed that the Chesapeake and Ohio would be absolutely relieved from the payment of the damage claim just referred to.

At the time this verbal agreement was made the contract price was, leaving out of view the claim for damages, inadequate to pay the market price, as admitted by the pleadings, of the coal plus the published rates of the Chesapeake and Ohio to Newport News, and the charges thence to the point of delivery. To put itself in a position to carry out the agreement an individual who represented the Chesapeake and Ohio made contracts in his own name with operators in the Kanawha district to furnish the desired coal. Without stopping to state the particular methods of accounting by which the result was accomplished, it is indisputable that the Chesapeake and Ohio bore the loss arising from the difference between the contract price, the price of the coal at the mines, the published rate to Newport News, and the cost of transporting thence to the point of delivery.

Undoubtedly long prior to the making of the first contract the Chesapeake and Ohio, besides its business as a carrier, bought and sold coal. This business was carried on by the company from about 1874 up to the time of the making of the contract of 1896, as testified by the president who made that contract, as follows:

"The coal was handled by a separate and distinct department of the railway company, the mine operators delivering for an agreed price at the mines to the coal agent of the railway company all coal mined by them, the net result realized from the selling price of the coal representing the freight earned by the railway company."

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said bituminous coal to said railroad company in its bins at such ports upon its lines as required by the monthly requisitions of its purchasing agent.

In consideration of the faithful performance by the said Chesapeake and Ohio Railway Company of all its agreements herein contained, said railroad company agrees to pay for said bituminous coal at the rate of two and seventy-five one-hundredths dollars per gross ton, New Haven basis, settlement to be made *monthly*.

Said railway company has the right to cancel any and all portions of said quantity of bituminous coal remaining undelivered on July 1, 1902.

Witness the names of the parties hereto this the 3d day of December, 1896.

CHESAPEAKE AND OHIO RAILWAY COMPANY,
By M. E. INGALLS, President.
THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,
By C. E. MELLEN, Second Vice President.

For value received, I hereby guarantee that the Chesapeake and Ohio Railway Company shall not fail to deliver coal on account of strikes.

J. PIERPONT MORGAN.

And the same official testified that he made the contract of 1896 as a continuation of this system.

In 1895, however, the State of West Virginia passed "An act to prevent railroad companies from buying or selling coal or coke and to prevent discrimination." The first section of this act made it unlawful for any railroad corporation to engage directly or indirectly in the business of buying and selling coal or coke. In consequence of this act, prior to the making of the contract of 1896, the coal department of the railroad was abolished. And it was the existence of the West Virginia statute which caused the Chesapeake and Ohio, when it contracted with operators in West Virginia to procure as to both contracts the coal for delivery to the New Haven to do so not in its own name but through another.

Before applying to these undisputed facts the legal question arising for decision, we must determine a question of fact as to which there is some dispute; that is, was the price at which the Chesapeake and Ohio contracted in 1896 to sell the coal to the New Haven sufficient to pay the cost of the coal at the mines, as well as the expense of delivery, including the published freight rate? Without stopping to go into the evidence we content ourselves with saying that we think the court below correctly held that the price was not adequate to accomplish these purposes, and that from the inception of delivery under the contract and during the whole period thereof, except for a brief time, caused by a lowering of the freight rates, the contract price was inadequate to net the railroad its proper legal tariff.

We are brought then to determine whether the contract made in 1896 for the two million tons of coal was void because in conflict with the act to regulate commerce and its amendments. In approaching the consideration of the act to regulate commerce, we for the moment put out of view the provisions of the West Virginia statute and its influence upon the validity of the contract made in West Virginia for the purpose of acquiring the coal which the Chesapeake and Ohio had obligated itself to deliver. We shall also assume for the purpose of the inquiry that the Chesapeake and Ohio, although not expressly authorized, was not prohibited by its Virginia charter from buying and selling and transporting the coal in which it dealt. The case, therefore, will be considered solely in the light of the operation and effect of the provisions of the act to regulate commerce, and we shall not direct our attention to expressly determining whether the assertion by a carrier of a right to deal in the products which it transports would not be so repugnant to the general duty resting on the carrier as to cause the exertion of the power to deal in the products which it transports to be unlawful, irrespective of statutory restrictions.

The question, therefore, to be decided is this: Has a carrier engaged in interstate commerce the power to contract to sell and tranport in comple-

Concluding, therefore, that both the contracts made by the Chesapeake and Ohio with the New Haven were contrary to public policy and void because in conflict with the prohibitions of the act to regulate commerce, it obviously follows that such contracts were not susceptible of being enforced by the New Haven, and afforded no legal basis for a claim of the New Haven against the Chesapeake and Ohio, and therefore the court below was correct in so deciding.

This leaves only for consideration the question raised by the cross-appeal of the Interstate Commerce Commission. That proposition is thus stated in the first of the assignments of error filed on behalf of the Commission:

"That the Circuit Court of the United States for the Western District of Virginia, after finding that the claim of the New York, New Haven and Hartford Railroad Company against the Chesapeake and Ohio Railway Company for $103,910.69, asserted as damages arising from a partial non-performance by said railway company of a contract of December 3, 1896, set out in the record, is, as to the whole of said claim and interest thereon, an illegal and unenforceable claim, and after finding that the verbal agreement between said companies, made in April, 1903, and set out in said record, whereby said railway company undertook to furnish to said railroad company 59,966 tons of coal, to be transported from West Virginia to Newport News, Virginia, over the lines of said railway company, and thence transported by vessels to certain New England ports, said coal to be delivered at said ports at the price of $2.75 per ton, New Haven basis, to be an invalid and illegal agreement; that said court merely enjoined and restrained the said Chesapeake and Ohio Railway Company, its officers, agents, and employees from, in any manner, direct or indirect, executing or performing, or attempting to execute or perform, either said contract of December 3, 1896, or said agreement of April, 1903, and from in any manner discharging or satisfying any obligation or seeming obligation arising from said agreements or either of them, or arising from any arrangement or agreement made in lieu of said agreements, or either of them; whereas said court should have further enjoined and restrained the Chesapeake and Ohio Railway Company from giving to said railroad company, or to any other person, firm, or company, any undue or unreasonable advantage or preference, and should further have restrained and enjoined the Chesapeake and Ohio Railway Company from transporting coal from one State to or through any other State for the New York, New Haven and Hartford Railroad Company, or for any firm, person, or company, at a less rate than the duly established freight rate of the said railway company in force at the time, and from further failing to observe its published tariffs, or from giving to the said New York, New Haven and Hartford Railroad Company, or to any person, firm, or company, in any manner whatsoever, any undue or unreasonable preference or advantage, and said decree, entered by the court on the 19th day of February, 1904, in addition to the provisions thereof, should have enjoined and restrained the New York, New Haven and Hartford Railroad Company and its officers and agents from seeking or accepting, in any manner, any direct or indirect rebate of the duly established freight rates of the Chesapeake and

Ohio Railway Company on any interstate commerce, and from seeking or accepting in any manner from said railway company any undue or unreasonable preference or advantage."

The contention, therefore, is that whenever a carrier has been adjudged to have violated the act to regulate commerce in any particular it is the duty of the court, not only to enjoin the carrier from further like violations of the act, but to command it in general terms not to violate the act in the future in any particular. In other words, the proposition is that by the effect of a judgment against a carrier concerning a specific violation of the act, the carrier ceases to be under the protection of the law of the land and must thereafter conduct all its business under the jeopardy of punishment for contempt for violating a general injunction. To state the proposition is, we think, to answer it. (*Swift & Company* v. *United States*, 196 U. S. 375.) The contention that the cited case is inapposite because it did not concern the act to regulate commerce, but involved a violation of the anti-trust act, we think is also answered by the mere statement of the proposition. The requirement of the act to regulate commerce that a court shall enforce an observance of the statute against a carrier who has been adjudged to have violated its provisions, in no way gives countenance to the assumption that Congress intended that a court should issue an injunction of such a general character as would be violative of the most elementary principles of justice. The injunction which was granted in the case of *In re Debs*, (154 U. S. 564,) was not open to such an objection, as its terms were no broader than the conspiracy which it was the purpose of the proceeding to restrain. To accede to the doctrine relied upon would compel us, under the guise of protecting freedom of commerce, to announce a rule which would be destructive of the fundamental liberties of the citizen.

As the court below did not decide that the second and sixth sections of the act, relating to the maintenance of rates, had been violated, the injunction, by it issued, was not made as directly responsive to the commands of the statute on that subject as we think it should have been. We, therefore, conclude that the injunction below should be modified and enlarged by perpetually enjoining the Chesapeake and Ohio from taking less than the rates fixed in its published tariff of freight rates, by means of dealing in the purchase and sale of coal. And, as thus modified, the decree below is

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.